TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 336

HORSE DRY DOCK & REPAIR COMPANY, PETITIONER,

vs.

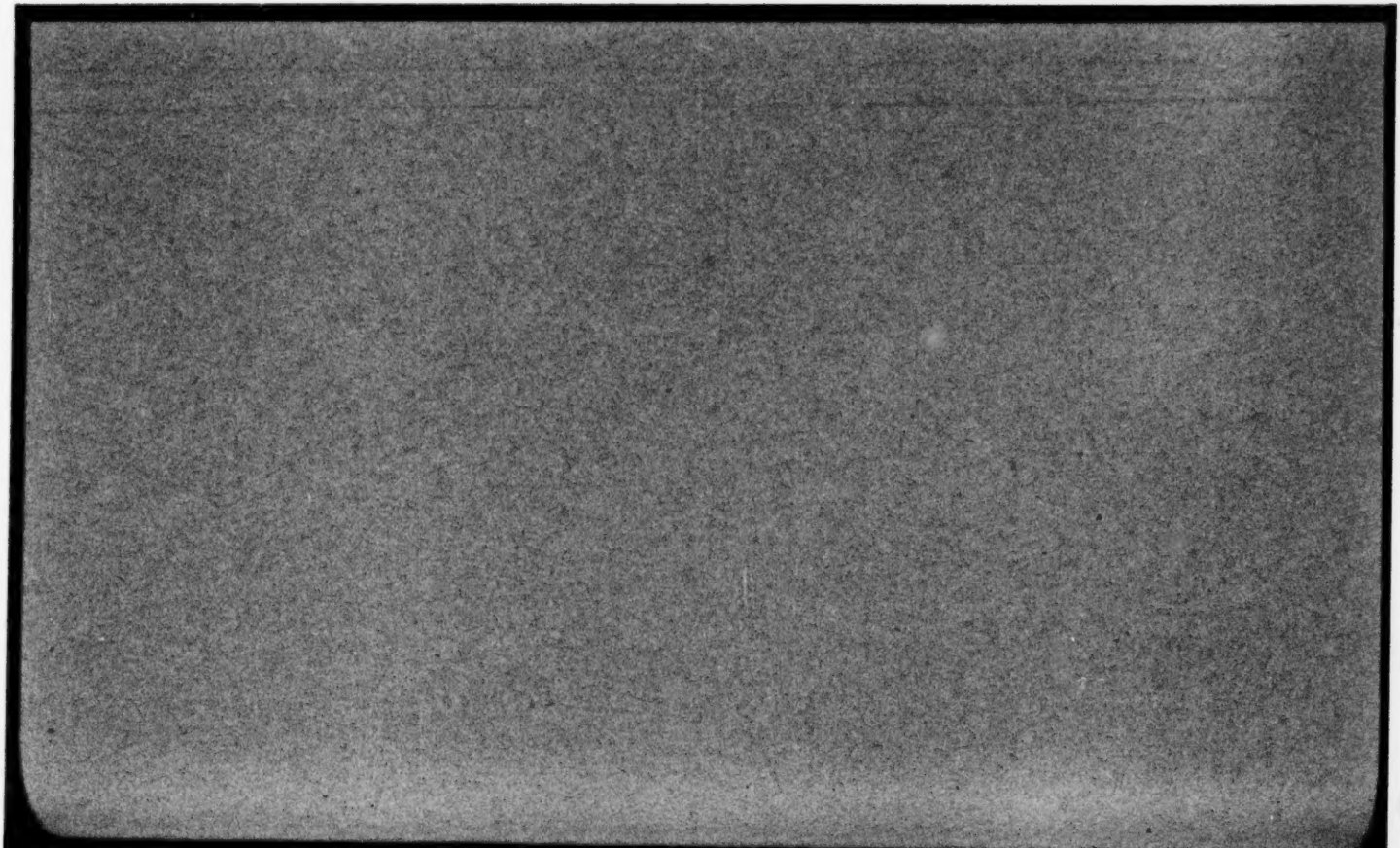
STEAMSHIP "NORTHERN STAR," HER ENGINES, ETC., AND HARRY LUBER

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 24, 1936

CERTIORARI GRANTED APRIL 20, 1936

(30,972)



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INDEX

	Original	Print
Record from the district court of the United States, eastern district of New York	1	1
Statement	1	1
Libel	2	1
Petition of Harry Luber under 59th rule	7	3
Answer of defendant Harry Luber	14	6
Answer of Morse Dry Dock & Repair Co. to intervening petition of Harry Luber	19	8
Morse Exhibit No. 1 in Evidence—Stipulation re statement of facts	20*a*	8
Statement of evidence	21	11
Appearances of counsel	21	11
Testimony of John J. Brady	22	11
John Garmey	25	13
Archibald F. Nicholas	40	22
Selig J. Katzman	53	30
John Garmey (recalled)	61	35
Selig J. A. Katzman (recalled)	62	35

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	Original	Print
Argument of counsel	63	36
Morse Exhibit 1-A—Morse acount of November 26, 1920	67	38
Petitioner's Exhibit 1-B—Preferred mortgage to United States of America	71	38
Petitioner's Exhibit 1-C—Assignment of mortgage	92	46
Morse Exhibit 2—Estimate Morse Dry Dock & Repair Company to MacFarland & Garmey	97	49
Petitioner's Exhibit A—Letter to Capt. O. O. Agaard, September 22, 1920	100	50
Petitioner's Exhibit B—Official papers of S. S. Northern Star	101	50
Petitioner's Exhibit D—Promissory notes	104	52
Opinion, Campbell, J.	128	60
Final decree	142	66
Notice of appeal	145	67
Assignments of error	147	68
Stipulation re transcript of record	150	69
Clerk's certificate	151	69
Proceedings in the United States circuit court of appeals, second circuit	152	70
Notice of motion to take new evidence	152	70
Affidavit of Michael N. Slotnick	153	70
Order granting motion to take new evidence	156	72
Amended answer of Harry Luber	158	72
Amended intervening petition of Harry Luber	163	75
Answer to amended petition of Morse Dry Dock & Repair Co.	170	78
Stipulation re statement of facts	173	80
Exhibit A in Evidence—Original purchase agreement between the United States and the American Star Line, Inc., December 24, 1919	175	81
Exhibit B—Bill of sale of registered vessel	202	93
Exhibit C—Certificate of registry	203	93
Opinion, Manton, J.	205	94
Judgment	213	97
Clerk's certificate	215	98
Order allowing certiorari	216	98

[fol. 1] **IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK**

Admiralty. 5603

MORSE DRY DOCK & REPAIR COMPANY, Libelant,

against

Steamship "NORTHERN STAR," Her Boilers, Engines, Tackle, etc., HARRY LUBER, Intervening Petitioner and Libelant

STATEMENT

1923
Aug. 14. Libel and Stipulation for costs filed.
22. Petition of Intervening Petitioner filed.
22. Answer of Intervening Petitioner filed.
Nov. 12. Answer by Libelant to Intervening Petition filed. No arrest made or bail taken or property attached or arrested.
Nov. 16. Trial had before Hon. Marcus B. Campbell. No question or questions referred to a commissioner or commissioners.
1924
Feb. 6. Final Decree entered.
June 24. Notice of appeal filed.
July 2. Bond on Appeal filed.
July 17. Assignments of Error filed.

[fol. 2] IN UNITED STATES DISTRICT COURT

LIBEL

To the Honorable the Judges of the District Court of the United States for the Eastern District of New York.

The Libel of the Morse Dry Dock & Repair Company against the Steamship "Northern Star," her engines, tackle, etc., and against all persons claiming any interest therein, in a cause of action, civil and maritime, of a nature hereinafter more specifically set forth, alleges as follows:

First. That at all the times hereinafter mentioned, the Libellant was, and still is, a domestic corporation, organized and existing under and by virtue of the laws of the State of New York, and having its office and principal place of business at the foot of 56th Street, Brooklyn, and within the Eastern District of New York and within the jurisdiction of this court.

Second. On information and belief, that the Steamship "Northern Star" herein referred to, is now within the jurisdiction of this Honorable Court.

Third. On information and belief, that the said Steamship "Northern Star" is in the possession of George W. Sterling, Receiver of the American Star Line, Inc., duly appointed in the United [fol. 3] States District Court for the Southern District of New York in the action of United States of America against the American Star Line, Inc.

Fourth. That on or between the 14th day of November and the 17th day of November, 1920, the Libellant at the special instance and request of the said American Star Line, Inc., in whose possession the said Steamship "Northern Star" was, performed certain work, labor and services and furnished certain supplies necessary for the making of repairs to the said Steamship of the reasonable value of One thousand eight hundred one and 87/100 Dollars ($1,801.87).

Fifth. That the aforesaid work, labor, services and repairs were so ordered by the said American Star Line, Inc., the owner of said Steamship, and were necessary in the management, operation and for the preservation and maintenance of said Steamship.

Sixth. That the furnishing of the said work, labor, services and supplies and the making of said repairs constituted a valid maritime lien against the said vessel, pursuant to the provisions of the Merchant Marine Act of 1920.

Seventh. That no part of said sum has been paid, although duly demanded.

[fol. 4] Eighth. That authority to bring this Libel is given by order of Honorable Francis A. Winslow, District Judge of this Court, duly made and entered on the 2nd day of August, 1923, in the action of United States of America against American Star Line, Inc., said order being as follows:

"Ordered that all of the aforesaid petitioners whose applications for leave to sue were denied without prejudice to the right to renew the said applications and all persons claiming maritime liens against or any right, title or interest in the Steamship Northern Star, be and they hereby are granted leave to file libels and issue process against the Steamship Northern Star without, however, placing a keeper on the vessel and to prosecute said libels to final decrees, and to the satisfaction thereof."

Ninth. That all and singular of the premises are true and within the Admiralty and Maritime Jurisdiction of the United States and of this Honorable Court.

Wherefore, the Libellant prays that process, in due form of law and according to the course and practice of this Court in cases of

Admiralty and Maritime jurisdiction may issue against the said Steamship "Northern Star," its engines, tackle, etc., and that all [fols. 5 & 6] persons claiming any interest therein may be cited to appear and answer the matters aforesaid, and that said Steamship "Northern Star," its engines, tackle, etc., may be condemned and sold to satisfy the claim of the Libellant aforesaid, with interest thereon from the 17th day of November, 1920.

Barber & Stetson, Proctors for Libellant.

Office & P. O. Address: 32 Broadway, Borough of Manhattan, New York City.

Sworn to by R. R. Piper. Jurat omitted in printing.

[fol. 7] IN UNITED STATES DISTRICT COURT

PETITION OF HARRY LUBER UNDER 59TH RULE

To the Honorable the Judges of the United States District Court for the Eastern District of New York:

The intervening petition and libel of Harry Luber against the Steamship Northern Star, her engines, boilers, etc., and any proceeds of sale thereof, and against all persons intervening for their interests or claiming any interest therein, in a cause of action, civil and maritime, alleges on information and belief as follows:

First. At all the times hereinafter mentioned, the libelant was, and still is a citizen of the United States of America, and a resident of the Borough of Brooklyn, County of Kings, City of New York.

Second. At all the times hereinafter mentioned the American Star Line, Inc., was and still is, a corporation organized and existing under the laws of the State of New York.

Third. The Steamship Northern Star now is or during the pendency of process hereunder, will be within the jurisdiction of the United States and of this Honorable Court.

[fol. 8] Fourth. On or about the 9th day of August, 1920, the American Star Line, Inc., the owner and holder of legal title of the Steamship Northern Star, her tackle and appurtenances, for value received and to secure the payment of the balance of the purchase price of said vessel, duly executed and delivered a preferred mortgage of the Steamship Northern Star, her tackle and appurtenances to the United States of America, acting by and through the United States Shipping Board, in the sum of one million two hundred seventeen thousand four hundred thirty-seven and 50/100 dollars ($1,217,437.50).

Fifth. Said preferred mortgage was duly recorded by the Collector of Customs at the Customs House at the Port of New York, in the

Book of Mortgages PM-1, page 58, on or about August 11, 1920, and was duly endorsed on said vessel's documents, in accordance with the requirements of Section 30 of the Act of June 5, 1920, known as the "Ship Mortgage Act, 1920," and all the requirements of law necessary to give complete priority to the aforesaid mortgage were and have been fully complied with.

Sixth. The said indebtedness of one million two hundred seventeen thousand four hundred thirty-seven and 50/100 dollars ($1,217,437.50) from said American Star Line, Inc., to the United States of America was further evidenced by ten (10) promissory notes totalling [fol. 9] one million two hundred seventeen thousand four hundred thirty-seven and 50/100 dollars ($1,217,437.50), duly executed by the said American Star Line, Inc., and delivered to the United States of America, the payment of which notes and other interest thereon is secured by the aforesaid mortgage.

Seventh. The said preferred mortgage, a copy of which will be produced upon the trial hereof and which is hereby made a part of this intervening petition and libel, contained, among others, the following provisions:

"Article II—Default

"Section I. In case any one or more of the following events herein termed events of default, shall happen, viz:

"(a) Default for more than fifteen days after it falls due in the payment of any instalment of interest on any of said notes; or

"(b) Default in the due and punctual payment of the principal of any note when the same shall become due; or * * * then and in such and every such case the party of the second part thereupon may:

"(a) Declare all outstanding notes to be immediately due and payable, whereupon all of said notes shall, upon such declaration, [fol. 10] become due and payable immediately and shall bear interest thereafter at the rate of six per centum per annum upon the amount of principal and interest then due thereon;

"(b) Recover judgment for any amount due upon said notes or any of them, either by their terms or by virtue of such declaration, and collect the same out of any property of the party of the first part; * * *."

"(d) Retake the vessel wherever the same may be and sell the same free from any claim by the party of the first part in law, in equity, in admiralty, or by statute * * *."

Eighth. On or about August 4, 1923, the United States of America represented by the United States Shipping Board, acting by and through the United States Shipping Board Emergency Fleet Corporation, for good and valuable consideration, duly transferred, as-

signed, set over and delivered unto the intervening petitioner and libelant, Harry Luber, the aforesaid preferred mortgage, and the notes payment whereof is secured thereby, as will more fully appear from a contract of assignment in writing dated August 4, 1923, which will be produced on the trial and is hereby made a part hereof.

Ninth. Although due demand was made therefor, the said American Star Line, Inc., failed to pay the principal and interest on the aforesaid notes as they fell due. The aforesaid failures to make said [fol. 11] payments in accordance with the terms of the aforesaid mortgage and notes were unlawful and improper and constituted defaults under the terms of said mortgage and the United States of America thereupon duly declared all of said notes to be and they forthwith became due and payable as to the whole of principal and interest as provided in said notes and mortgage. No part thereof has been paid although due demand has been made therefor.

Tenth. By reason of the premises and by virtue of the provisions of the "Ship Mortgage Act, 1920," the said mortgage indebtedness of one million two hundred seventeen thousand four hundred thirty-seven and 50/100 dollars ($1,217,437.50) with interest thereon, constituted and still constitutes, a preferred lien against the Steamship Northern Star, her engines, tackle, apparel, etc., and any proceeds of sale thereof; and the intervening petitioner and libelant herein is entitled to enforce said lien against said vessel, etc., or any proceeds thereof by suit in rem in admiralty and is entitled to full satisfaction of the aforesaid indebtedness prior to any payment to the libelant, Morse Dry Dock & Repair Company.

Eleventh. All and singular the premises are ture and within the admiralty and maritime jurisdiction of this Honorable Court.

Wherefore, the intervening petitioner and libelant prays that:

[fol. 12] (1) Process in due from of law according to the course and practice of this Honorable Court in such cases, may issue against the steamship Northern Star, her boilers, engines, tackle, apparel, furniture and fixtures.

(2) The aforesaid preferred mortgage may be enforced as such upon, and against, said steamship, her boilers, engines etc. and the proceeds of sale thereof.

(3) The aforesaid mortgage may be determined and adjudged to be a preferred mortgage, and to be a first lien upon said steamship, her boilers, engines, etc., and the proceeds of sale theerof, prior and superior, to that of all other claims, liens and demands thereon.

(4) The steamship Northern Star, her boilers, engines, etc., may be sold under the order of this court and the intervening petitioner and libelant may be paid from the proceeds of sale thereof the sum of $1,217,437.50 with interest and costs.

(5) The intervening petitioner and libelant may have such other and further relief as may be just in the premises.

Gerson C. Young, Proctor for Intervening Petitioner, and Libelant.

Office and Post Office Address: 80 Maiden Lane, Borough of Manhattan, City of New York.

[fol. 13] State of New York,
County of New York, ss:

Harry Luber, being duly sworn, deposes and says:

I am the intervening petitioner and libelant herein and have read the foregoing intervening petition and libel and know the contents thereof.

The same is ture, except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

The sources of my knowledge and the grounds for my belief are communications had with officers and representatives of the American Star Line, Inc., and the United States of America.

Harry Luber.

Subscribed and sworn to before me this 21st day of August, 1923. Frank A. Benero, Notary Public.

[fol. 14] In United States District Court

Answer of Harry Luber to Libel

To the Honorable the Judges of the District Court of the United States for the Eastern District of New York.

The answer of Harry Luber, intervening petitioner herein, to the libel of the Morse Dry Dock & Repair Company against the Steamship Northern Star, her engines, tackle, etc., and against all persons claiming any interest therein, in a cause of action, civil and maritime, alleges upon information and belief as follows:

First. He admits the matters alleged in the First Article of the libel.

Second. He admits the matters alleged in the Second Article of the libel.

Third. He denies the matters alleged in the Third Article of the libel.

Fourth. He denies that he has any knowledge or information sufficient to form a belief as to the matters alleged in the Fourth, Fifth, Sixth and Seventh Articles of the libel.

Fifth. He admits the matters alleged in the Eighth Article of the libel.

[fol. 15] Sixth. He admits the admiralty and maritime jurisdiction of the United States and of this Honorable Court. He denies the other matters alleged in the Ninth Article of the libel.

Seventh. Further answering and as a separate and complete defense herein, he alleges that:

On or about the 9th day of August, 1920, the American Star Line, Inc., the owner and holder of legal title to the Steamship Northern Star, for value received and to secure the payment of the balance of the purchase price of said vessel, executed and delivered a preferred mortgage of the Steamship Northern Star, her tackle and appurtenances, to the United States of America in the sum of One Million Two Hundred Seventeen Thousand Four Hundred Thirty-Seven and 50/100 Dollars ($1,217,437.50). The said indebtedness of One Million Two Hundred Seventeen Thousand Four Hundred Thirty-Seven and 50/100 Dollars ($1,217,437.50) was further evidenced by ten (10) promissory notes duly executed by the said American Star Line, Inc., and delivered to the United States of America, the payment of which notes was secured by the aforesaid mortgage. By the terms of the aforesaid mortgage, failure to pay the interest or principal of any of the aforesaid notes when each became due constituted a default thereunder which gave the United States of America the right to foreclose the said mortgage and recover the [fol. 16] entire indebtedness thereunder as a maritime lien by an action in rem against the Steamship Northern Star.

The American Star Line, Inc, defaulted in the payment of the interest and principal amount of the said notes, and the right thereupon accrued to the United States of America under the aforesaid preferred mortgage to collect the entire indebtedness thereunder as a maritime lien by an action in rem against the Steamship Northern Star. The said mortgage indebtedness, immediately upon the aforesaid default, constituted and still constitutes a preferred lien against the Steamship Northern Star, her engines, tackle, apparel, etc., and any proceeds of sale thereof, which is prior to any lien of the Morse Dry Dock & Repair Company, the libellant herein.

On or about the 4th day of August, 1923, the United States of America duly assigned all its right, title and interest in the aforesaid mortgage and the notes secured thereunder to the intervening petitioner herein, and the said intervening petitioner, upon delivery of the said mortgage and notes, which was duly made, became and is the present holder thereof and is entitled to the recovery herein. By reason of the premises he is the holder of a preferred maritime lien against the Steamship Northern Star, her engines, tackle, etc., and any proceeds thereof, which maritime lien is prior in rank to any lien of the Morse Dry Dock & Repair Company, and he is entitled to full payment of the mortgage indebtedness up to the amount of One Million Two Hundred Seventeen Thousand Four [fols. 17 & 18] Hundred Thirty-Seven and 50/100 Dollars ($1,217,437.50) before any payments are made to the libelant, Morse Dry Dock & Repair Company, from the proceeds of sale of the Steamship Northern Star, her engines, tackle, apparel, etc.

Wherefore, the intervening petitioner prays that the libel herein be dismissed with costs and that he be granted such other and further relief as the Court may deem just in the premises.

Yours, etc., Gerson C. Young, Proctor for Intervening Petitioner. Office & Post Office Address, 80 Maiden Lane, Borough of Manhattan, New York City.

Sworn to by Harry Luber. Jurat omitted in printing.

[fol. 19] In United States District Court

Answer of Morse Dry Dock & Repair Co. to Petition

To the Honorable the Judges of the District Court of the United States for the Eastern District of New York:

The Answer of Morse Dry Dock & Repair Co. to the intervening petition and libel of Harry Luber against the S. S. "Northern Star," her engines, boilers, etc., and any proceeds of sale thereof, and against all persons intervening for their interest or claiming any interest therein, in a cause of action Civil and Maritime.

First. Admits the matters alleged in the Second and Eleventh paragraphs of the intervening petition and libel.

Second. Denies any knowledge or information sufficient to form a belief as to the matters alleged in paragraphs First, Third, Fourth, Sixth, Seventh, Eighth and Ninth of the intervening petition and libel.

Third. Denies the matters alleged in paragraph Fifth and Tenth of the intervening petition and libel.

Barber & Stetson, Proctors for Morse Dry Dock & Repair Co. Office & Post Office Address: 32 Broadway, Borough of Manhattan, New York City.

[fol. 20] Sworn to by R. R. Piper. Jurat omitted in printing.

[fol. 20a] Morse Exhibit No. 1

United States District Court, Eastern District of New York

Morse Dry Dock & Repair Company, Libelant,

against

Steamship Northern Star, Her Engines, Tackle, etc.

Stipulation

For the purpose of the trial of this action, it is hereby stipulated and agreed by and between the proctors for the respective parties hereto, as follows:

First. That the libelant herein, Morse Dry Dock & Repair Company, during the period from November 14, 1920, to November 27, 1920, both dates inclusive, furnished to the steamship Northern Star certain repairs, supplies and services as more fully appears from the bills annexed hereto marked Exhibit A, made a part hereof and hereby offered in evidence in behalf of the libelant the net charges as shown by said Exhibit A amounting, exclusive of interest, to the [fol. 20b] sum of $1,705.87 are fair and reasonable charges for the repairs, supplies and services so furnished; the said bills are offered in lieu of evidence of the charges therein contained and not in any way as an admission on the part of Harry Luber, intervening petitioner and libelant herein that the repairs, supplies and services aforesaid were furnished on the credit of the said Steamship.

Second. That on or about the 9th day of August, 1920, the American Star Line, Inc., the owner and the holder of the legal title to the said Steamship Northern Star, for value received and to secure the payment of the balance of the purchase price to the said vessel, executed and acknowledged and delivered to the United States of America a purchase money mortgage in the sum of $1,217,437.50 covering the said Steamship Northern Star; that the said indebtedness was evidenced by ten promissory notes totalling $1,217,437.50 executed by the American Star Line, Inc. and delivered to the United States of America payment of which notes was secured by the aforesaid purchase money mortgage; a true and correct copy of the aforesaid mortgage is annexed hereto, marked Exhibit B, made a part hereof and hereby offered in evidence with the same force and effect as if it were the original thereof.

Third. That on the 11th day of August, 1920, there was received for record in the office of the Collector of Customs at the Custom House in the Port of New York a bill of sale for the Steamship [fol. 20c] Northern Star by which the United States of America through the United States Shipping Board conveyed title to the aforesaid steamer to the American Star Line, Inc.; that on the same day, namely August 11, 1920 and at approximately the same hour of that day, there was received for record at the aforesaid office of the Collector of Customs, at the Custom House, in the Port of New York, a purchase money mortgage on the steamship Northern Star in the sum of $1,217,437.50 from the American Star Line, Inc. to the United States of America; the aforesaid bill of sale was recorded on August 11, 1920 in Book R 171 No. 6 and the aforesaid mortgage was recorded in Book P. M. 1, page 58.

Fourth. That on the 27th day of June, 1921, the record of the aforesaid mortgage was endorsed on the documents of the Steamship Northern Star by the Collector of the Port of New York as required by the provisions of Section 30 of the Act of June 5, 1920, known as the "Ship Mortgage Act, 1920."

Fifth. That the American Star Line, Inc. on the 30th day of December, 1920, defaulted in the payment of the interest and prin-

cipal amount of the promissory note which pursuant to the aforesaid mortgage was due and payable on the 30th day of December, 1920; that the right thereupon accrued to the United States of America, the then holder of the aforesaid mortgage on the said vessel, to collect [fol. 20d] the entire indebtedness, the payment of which was secured by the terms of the said mortgage.

Sixth. That on the 4th day of August, 1923, the United States of America, represented by the United States Shipping Board acting by and through the United States Shipping Board Emergency Fleet Corporation, for good and valuable consideration, duly assigned, transferred and set over all the rights, title and interest in and delivered unto Harry Luber, intervening petitioner and libelant herein, the aforesaid mortgage and the promissory notes therein referred to, payment whereof was secured thereby; the aforesaid assignment of said mortgage was duly recorded by the Collector of Customs, at the Custom House in the Port of New York on August 11, 1923, in Book P M 9, Page 10; the aforesaid assignment of mortgage is hereto annexed and marked Exhibit C, made a part hereof and hereby offered in evidence.

Seventh. It is hereby further stipulated and agreed that the libel herein may be and hereby is amended so as to change the date of November 17, 1920, set forth in Article Fourth thereof, of November 27, 1920; that it be further amended so as to include an allegation in paragraph third thereof to the effect that the Steamship Northern Star on the rate of the vertification of the libel, was in the custody of the United States District Court for the Eastern District of New York.

[fol. 20e] Eighth. It is hereby further stipulated and agreed that the intervening petition and the answer to the libel herein may be and hereby are amended so as to include the further separate defense in the answer and the further allegation in the intervening petition, as follows:

"That by the terms of the aforesaid mortgage on the Steamship Northern Star given by the American Star Line, Inc. to the United States of America, the creation of any maritime liens upon the Steamship Northern Star of any liens which would rank prior to the lien of the mortgagee was prohibited and that the libelant herein cannot have any lien on said vessel for the repairs, supplies and services alleged in the libel."

Ninth. It is hereby further stipulated and agreed that the answer of the libelant Morse Dry Dock & Repair Company herein to the said intervening petition be and it hereby is amended by adding thereto an allegation denying the matters set forth in the preceding paragraph hereof.

Dated New York, November 12th, 1923.

Barber & Stetson, Proctors for Libelant. Gerson C. Young, Proctor for Harry Luber, Intervening Petitioner and Libelant.

[fol. 21] IN UNITED STATES DISTRICT COURT

[Title omitted]

Statement of Evidence—November 16th, 1923

APPEARANCES OF COUNSEL

Messrs. Barber & Stetson (by Arthur H. Stetson, Esq.,) for Morse Dry Dock & Repair Co.

Gerson C. Young, Esq., for Harry Luber, Intervening Petitioner.

Mr. Stetson: I offer stipulation in evidence. Marked Morse Exhibit No. 1.

[fol. 22] JOHN J. BRADY, being called as a witness on behalf of Morse Dry Dock and duly sworn, testified as follows:

Direct examination by Mr. Stetson:

Q. What is your business?

A. I work with the Morse Dry Dock and Repair Company, Brooklyn, N. Y.

Q. What is your title there?

A. At the present time, accountant.

Q. Were you with the Morse Dry Dock in November, 1920?

A. Yes.

Q. What were your duties with them then?

A. Head of the billing department.

Q. I show you stipulation which contains bills rendered by the Morse Dry Dock and Repair Company for repairs to the Steamship Northern Star and ask if those bills were prepared under your direction?

A. Yes, sir, they were.

Q. What was done with those bills after they were prepared; to whom were they sent, if anyone?

A. Bills were mailed to McFarlane & Garmey.

Q. Who were McFarlane & Garmey?

A. My understanding at that time was——

Q. What was their business?

A. Consulting engineers.

Q. Why was the bill mailed to them?

A. They placed the work with us.

Q. Can you tell when that bill was sent—do you know when it was sent?

A. Sent on the 23rd of November—10th of November, at least—[fol. 23] wait, I beg your pardon, bills were mailed out the third day of December, 1920.

Q. Do you know whether or not any of these bills have been paid, or any part of them?

A. I know they have not.

Cross-examination by Mr. Young:

Q. You say McFarlane & Garmey were consulting engineers?
A. That is my understanding.
Q. Did you know either of these gentlemen?
A. No, sir.
Q. Know Mr. Garmey?
A. By sight only.
Q. Is he here in Court?
A. He is.
Q. At the time when the work was done, or prior thereto, did you meet Mr. Garmey or Mr. McFarlane?
A. No, sir.
Q. Who was the one who received the order from McFarlane & Garmey, the one in the employ of Morse Dry Dock and Repair Company?
A. I presume that came through the regular office in the operating department.
Q. Who was the head of that department?
A. Mr. Hallock.
Q. In November, 1920, were you employed by the Morse Dry Dock and Repair Company?
A. At that time I did not carry that title.
Q. What did you carry?
A. Head of the billing department.
Q. As head of the billing department what were your duties?
A. To compile the charges in the form of a bill, have the bill registered, and pass them along for mailing out.
[fol. 24] Q. These particular bills attached to the stipulation, Exhibit 1, came to you only after all the work had been done?
A. The bills did not come to me. I made the bills up.
Q. The figures whereby you compiled the bills came to you after the work was done?
A. Yes.
Q. You have not any personal knowledge of the doing of the work?
A. Nothing except what I can get from the records of the office.
Q. You have not any personal knowledge how the order came to be given by McFarlane & Garmey?
A. No.
Q. Who would be the man in the Morse Dry Dock and Repair Company who would have personal knowledge of the order for the work?
A. Mr. Hallock.
Q. Is Mr. Hallock now employed by the Morse Dry Dock and Repair Company?
A. Yes.
Q. Is he in Court?
A. No.

Mr. Stetson: Supposed to be.

Q. Was he in Court yesterday?
A. No.

Q. All the information you have in respect to the bills is derived from records of the Morse Dry Dock and Repair Company, or what someone in their employ told you?
A. Absolutely.
Q. Did you know the Northern Star?
A. I knew of the ship.
Q. Had you ever been on board that ship?
A. No.
Q. Have you ever met the captain or chief officer of that ship?
A. No, sir.
Q. Did you know them?
A. No, sir.

[fol. 25] JOHN GARMEY, being called as a witness on behalf of the Morse Dry Dock and Repair Company and duly sworn, testified as follows:

Direct examination by Mr. Stetson:

Q. What is your business?
A. Consulting engineer and naval architect.
Q. How long have you been engaged in that business?
A. Forty years.
Q. How long in New York City?
A. About 25 years.
Q. Now you are here under a subpœna from the libellant in this case, are you?
A. I am.
Q. During the month of November, 1920, did you make a survey of the steamship Northern Star?
A. I did.
Q. At whose request did you make a survey?
A. Advised by the manager of the American Star Line that the Northern Star had arrived, and following my regular routine my business was to go on board the vessel and see what repairs were necessary.
Q. Did you go on board the vessel?
A. I did.
Q. Do you recall the time when you went on board the vessel and where the vessel was at that time?
A. I do.
Q. Will you state it?
A. The vessel was at that time at anchor in Bay Ridge Flats.
Q. Do you recall the date you went aboard the vessel?
A. I do not, but there ought to be an account here because Morse charged them for going——
[fol. 26] Q. How did you get aboard?
A. Morse launch.
Q. Did anybody go with you at that time from the Morse Dry Dock and Repair Company?
A. Not at that time.

Q. You went on the vessel at that time and made a survey?

A. Yes.

Q. And the purpose of that was to ascertain what repairs or work was needed to be done?

Mr. Young: Won't all the bills show it was November 14th, and we will agree that is the date?

Q. After you made your survey will you tell us what next you did in connection with this work?

A. After making the survey I reported to the American Star Line certain repairs were necessary and at their request drew up a specification and sent it to several firms and in due course received tenders; submitted the amount of the tenders to the American Star Line, and they in turn agreed with me to give it to the lowest tender, which, at that time, was Morse Dry Dock and Repair Company, and the work was placed in the hands of the Morse Dry Dock and Repair Company.

Q. I call your attention to a stipulation on file in this case containing bills rendered from the Morse Dry Dock and Repair Company, and ask if you will look at those bills and state if you can which of those bills represent the work done under the bid of the Morse Dry Dock and Repair Company, to which you refer?

A. A rough copy of the tender is here, $1045.

[fol. 27] Mr. Stetson: Witness refers to bill which totals $1,045. Marked Exhibit A.

Q. Was the work called for in that specification and as set forth in that bill performed?

A. It was.

Q. Was that work done under your supervision?

A. It was.

Q. Where was the work performed, where was the vessel at the time the work was performed?

A. The vessel, if I remember rightly, was brought into Morse Dry Dock and Repair Company into their yard.

Q. Was any other work done on the vessel at that time or approximately that time under your direction, acting in your capacity as you stated, surveyor and engineer, for the American Star Line?

A. There was some extras cropped up.

Q. I call your attention to the bill contained in the stipulation totaling the sum of $743.37, and ask you if you can say whether or not that was the work which was done in addition to the work which was done under the contract?

A. It was.

Q. Was that work supervised by you?

A. It was. Excuse me. I see a bill that causes me to make a correction. I informed your Honor she was in Bay Ridge Flats. She was at Quarantine, and I recall distinctly going to Quarantine.

Q. Going back to the bid of the Morse Dry Dock and Repair Com-
[fol. 28] pany, I ask you if you received a written bid from the Morse Dry Dock and Repair Company, a letter?

A. I did.
Q. Have you your file there of the vessel on that work performed that time?
A. Yes.
Q. Will you turn to your files and see if you have a letter from the Morse Dry Dock and Repair Company about under date of November 23rd, 1920?
A. November 22nd.
Q. Will you let met see that letter please, if I can take it from the file. (Did so.)

Mr. Stetson: I offer this in evidence.
Marked Morse Exhibit No. 2.

By the Court:

Q. Is that the bid?
A. The original.

Mr. Stetson: Amounting to $1,045 which corresponds to the bill.

By Mr. Stetson:

Q. I think I have asked you if you supervised all the work you refer to here on the Steamship Northern Star?
A. Yes, I supervised all.

By the Court:

Q. Was it all done?
A. Yes.

By Mr. Stetson:

Q. Were bills submitted to you for this work?
A. Yes.
[fol. 29] Q. Do you recall when you received the bills?
A. I recall receiving them because I checked them over and passed them over for payment.

By the Court:

Q. To whom did you pass them?
A. American Star.

By Mr. Stetson:

Q. You have referred several times to your dealings with the American Star Line, but you have not stated whom of the American Star Line you talked with in regard to this work?
A. Mr. Ginsberg, and next to him Mr. Katzman.
Q. How long had you been doing work, Mr. Garmey, for the American Star Line?
A. About eighteen months, I think, or two years.

Q. Did you have any arrangement or employment with the American Star Line?

A. They paid me a retainer to look after all the vessels that came in to them.

Q. What, in a general way, were your duties in connection with the vessels of the American Star Line?

A. My duties were first of all to use my ingenuity and keep down the cost of repairs and look after the up-keep of the vessels, as required by law, and direct work.

Q. When these bills were received by you, they were submitted, as you say, to the American Star Line?

A. Yes.

Q. Was any objection made by the American Star Line to you in regard to these bills at any time?

A. Not to my recollection.

[fol. 30] By the Court:

Q. They just did not pay them, that is all?

A. That is all.

By Mr. Stetson:

Q. Do you know Mr. Hallock?

A. I do.

Q. He is the general superintendent of the yard at the Morse Dry Dock and Repair Company, and was at that time?

A. He was the second superintendent at that time. He is head superintendent now.

Q. Did you from time to time confer with Mr. Hallock concerning the work on the Northern Star you refer to here?

A. Yes.

Q. Have you, representing the American Star Line, ordered other work on American Star Line vessels of the Morse Dry Dock and Repair Company?

A. Previous to this one I did.

Q. Recall which one?

A. I think the first vessel was one called Lord Ormande. She was handled by the American Star Line and owned by them, I understand.

Q. Do you recall whether you ordered work on the American Star?

A. I do.

Q. Was that previous to the work here on the Northern Star?

A. I think so. Oh, yes, it was.

Q. Do you recall whether any work was ordered by you of the Morse Dry Dock and Repair Company on this same vessel, Northern Star, previous to the work here referred to?

A. On different voyages, yes.

[fol. 31] Q. How were these orders given with reference to the other vessels, the same as this particular one?

A. If they amounted to anything of consequence, a thousand dollars, but if two or three hundred dollars it was left to my discretion who I would give it to, and the possibility of getting through with the work in the least possible time.

Q. Before accepting the bid of the Morse Dry Dock and Repair Company on this work did you confer with any officer of the American Star Line?

A. Certainly. With Mr. Ginsberg.

Cross-examination by Mr. Young:

Q. As I understand it, Mr. Garmey, your position as consulting engineer for the American Star was not one whereby you were exclusively employed by the American Star, is that right?

A. That is right.

Q. You were employed by others as well as the American Star Line?

A. I was.

Q. When you speak of monthly retainer for each of their vessels you mean you had retainers from other concerns that owned vessels?

A. Yes.

Q. Now in November, 1920—on the day you went to visit the vessel, which was, as you say, lying at Quarantine, you examined it to see what repairs were required?

A. So far as possible that day.

Q. The next time you saw the vessel was it then at the yards of the Morse Dry Dock and Repair Company?

A. I should say it was, but I am not quite sure.

[fol. 32] Q. But the repairs, in any event, were made at the yard of the Morse Dry Dock and Repair Company?

A. They were.

Q. On each of the days repairs were going forward were you on the vessel?

A. Yes.

Q. As I see the bills attached to the stipulation here it appears that about seven days in all were consumed in making repairs. Do you now say you were on the vessel each of those seven days?

A. I was.

Q. On each of those seven days whom did you meet on that vessel representing the Morse Dry Dock and Repair Company?

A. First of all I met the general superintendent of the yard.

Q. Who was he?

A. Mr. Hallock—Assistant General Superintendent.

Q. Is he in Court?

Mr. Stetson: On his way.

Q. Who was the general superintendent?

A. Mr. Murray.

Q. These two men, as I understand, were in authority in matters pertaining to the making of repairs on vessels at Morse Dry Dock and Repair Company?

A. Yes.
Q. Did you meet Mr. Murray?
A. Yes.
Q. Did you meet them on the vessel or around the yard?
A. Around the yard and on the vessel.
Q. Did they speak to you about making the repairs?
A. Certainly, and took my instructions how I wanted them done.
[fol. 33] Q. Did they speak to you about anything else but the making of repairs?
A. I don't think so.
Q. Were either of these two gentlemen an officer of the Morse Dry Dock and Repair Company to your knowledge?
A. Both were.
Q. When I say officer, I mean President, vice-President or Secretary?
A. I don't know. They were employees of the Morse Dry Dock and Repair Company.
Q. You had met these gentlemen before?
A. Yes.
Q. You had met them in connection with previous repairs on this very vessel?
A. I presume so.
Q. I presume all previous repairs on this very vessel were paid for by the American Star Line?
A. As far as I know.
Q. Did either Mr. Murray or Mr. Hallock question you any time with respect to the existence of a mortgage on the Northern Star?
A. Certainly not.
Q. Did you say anything to Mr. Murray or Mr. Hallock regarding a mortgage?
A. No.
Q. Did you know that there was a mortgage on the vessel in the month of November, 1920?
A. From the beginning of my connection with the line I understood on all vessels of the American Star Line, that is the American Star and Northern Star, there was some connection between the Line and the Shipping Board.
Q. Didn't you know yourself in November, 1920, that at that time [fol. 34] a mortgage existed on the vessel Northern Star?
A. I must have known that there was a mortgage at that time.
Q. When you say you must have known——
A. I knew they paid so much for it and they would not get the ship unless there was a mortgage on it.
Q. How did the knowledge of that fact come to you?
A. From the fact I was informed by Mr. Ginsberg he paid $800,000 for the two ships, out of a million and a half.
Q. Prior to the time you awarded to the Morse Dry Dock and Repair Company the making of these repairs, you say you spoke to Mr. Ginsburg, and probably Mr. Katzman?
A. Yes, I always submitted the lowest bid to the representative of the firm I was working for.

Q. You are quite sure in this particular connection, particular transaction, involving this bid, which was $1,045 you spoke to Mr. Ginsburg or Mr. Katzman about it before you awarded it to the Morse Dry Dock and Repair Company?

A. Surely.

Q. Mr. Ginsburg, I presume, told you to give it to the Morse Dry Dock and Repair Company?

A. He asked my opinion about it and said "Go ahead."

Q. I observe that the bills attached to the stipulation in this case and referred to as Exhibit A are all made out to McFarlane & Garmey, in addition to other names.

A. I think it says "Northern Star and owners."

Q. And then McFarlane & Garmey?

A. Yes.

Q. Were you in the habit of receiving all bills from the Morse Dry [fol. 35] Dock and Repair Company for repairs on the Northern Star?

A. In that style?

Q. Yes?

A. At all times.

Q. That was for the purpose of having you check up on the bills, is that correct?

A. Certainly.

Q. Did you at any time in November, 1920, or prior thereto, have any authority from the American Star Line or its officers to pledge the credit of the vessel Northern Star?

A. None whatever, excepting that I was authorized to go ahead and do work for them. That was pledging the credit, I presume.

Q. I ask you not about pledging the credit of the American Line, Incorporated, but pledging the credit of the Northern Star?

A. No.

Q. You mean you had no authority of any kind to pledge the credit of the vessel?

A. No.

Q. You have no authority?

A. No.

Q. As to authority to pledge the credit of the American Star Line, Inc., is it correct to say you had authority to pledge its individual credit for work to be done on the vessel?

A. Yes.

Q. Did you at any time prior to and including the month of November, 1920, pledge to anyone the credit of the vessel Northern Star?

Mr. Stetson: I do not think that is proper. What he did is proper. He asks if he pledged the credit of the vessel.

[fol. 36] The Court: Ask what he did and I will determine whether he pledged the credit of the vessel. Get his conversations when he ordered the work and I will draw the conclusion from that.

Q. With whom on the part of the Morse Dry Dock and Repair Company did you talk prior to the time that the work was awarded to them?

A. Possibly to the head of the Estimating Department. I would call him on the phone and say we had a steamer at such and such a place and I had drawn up specifications and I was about to obtain tenders and ask him to send his representative there to look over the work with me.

Q. When you went to the vessel at Quarantine November 14, 1920, did someone from the Morse Dry Dock and Repair Company accompany you?

A. No.

Q. That was all preliminary to the time you made up your own list of specifications?

A. Yes.

Q. Having made up your list of specifications and having, I presume, forwarded it to the Morse Dry Dock and Repair Company, you then received this paper here, November 22nd, did you not, which is Morse Dry Dock and Repair Company Exhibit 2?

A. That is right.

Q. The man whose name is signed to this paper is one C. H. Want?

A. Yes. At that time he was head man of the Estimating Department.

[fol. 37] Q. Is that the man whom you spoke with?

A. That is the man to whom I sent a specification, and the man who handed the bids to me.

Q. Having received this letter, Exhibit 2, did you communicate with Mr. Want personally?

A. After I had spoken to the manager of the American Star Line.

Q. You spoke to Mr. Want?

A. I telephoned Mr. Want the work had been awarded his firm.

Q. And you told him to go ahead?

A. Yes.

Q. Anything else said by you to him?

A. No.

Q. Was any other person representing the Morse Dry Dock and Repair Company spoken to by you?

A. No, it was not necessary.

Q. When you told him his bid was accepted and told him to go ahead with the work, that was all the conversation you had with a representative of the Morse Dry Dock and Repair Company?

A. Yes, except the details of the repairs.

Q. That was after the repairs had been begun?

A. Yes.

Q. Now the specification you sent forward to the Morse Dry Dock and Repair Company and others, have you a copy of that?

A. I believe there is one on file there.

It is stipulated the home port of the Steamship Northern Star, was the Port of New York.

A. (continued). This is a rough copy of it.

[fol. 38] Q. Let us have that (referring to paper witness spoke about).

A. That is the one. Some of my notes are on the bottom.
Q. Are the notes part of the specification?
A. Might have come under it in a general way, but not particularly. That is roughly the requisition of the engineer and chief officer at that time, that list there. That does not appear to be a copy of the specifications sent out here.

Mr. Young: Have you a copy of the specifications?
Mr. Stetson: No.
The Court: Solicitations?
Mr. Stetson: No, I never saw one.
The Witness: Here is one, 1 to 26. That is it.

Q. This paper you handed me, November 13, 1920, is a copy of the engineer's repair list?
A. Yes.
Q. And this paper you now hand me, no date, headed "Deck repair list" is a copy of the balance of repairs?
A. Yes.
Q. Here is a copy you hand me called "Steward's Repair List."
A. Yes. It does not necessarily follow those items are in that account, because when I received that requisition from the different officers I could see ones I thought not necessary.
Q. In any event these three sheets are copies of sheets which reached a number of the persons to whom you sent them, including [fol. 39] the Morse Dry Dock and Repair Company?
A. Not necessarily to the letter, because I might have cut some of them out.

By the Court:

Q. Those are preliminary requisitions made by various officers, and from them you selected what should be done?
A. Yes.

By Mr. Young:

Q. Haven't you got in your files a complete sheet of the very things you desired to have done, and which you sent out to the various companies for all purposes?
A. It does not appear here. It must have been sent out, because there are the various bids of Morse, Robins and Tickle and Todds. Those two would cover. "We herewith submit the following" items 1, 2 and so on. That would cover the requisition to the different firms evidently.

Mr. Stetson: What do you refer to?
Mr. Young: A paper which seems to be an exact duplicate of Exhibit 2 .

Redirect examination by Mr. Stetson:

Mr. Stetson: If your Honor pleases, I have another witness on the way here, and he has not appeared. I do not want to hold up

the proceedings. I was thinking his testimony would be to a large [fol. 40] extent corroborative of the testimony given by Mr. Garmey. That is Mr. Hallock, who was superintendent at the yard at that time.

The Court: He is coming?

Mr. Stetson: He was reported to be coming on his way some time ago. I do not know what happened.

The Court: Do you care to go on?

Mr. Young: Yes.

The Court: All right, when Mr. Hallock comes in we will go on with him.

By Mr. Young:

Q. You are not a director, officer or stockholder of the American Star Line?

A. No.

Archibald F. Nicholas, called as a witness for Intervening Petitioner and duly sworn, testified as follows:

Direct examination by Mr. Young:

Q. In 1920, November, did you bear any relation to the American Star Line, Inc.?

A. I was chief officer of the steamer Northern Star.

Q. That steamer was owned by the American Star Line, Incorporated?

A. Yes.

Q. So you were employed by that firm?

A. Yes.

[fol. 41] Q. When did you become chief officer of the Northern Star?

A. September 22, 1920.

Q. Prior to that date had you had any connection with that vessel?

A. I received a letter from the master of her at that time, appointing me chief officer.

Q. Who was the master of the vessel prior to September 22nd, 1920?

A. Captain O. Agaard.

Q. What was his first name?

A. Ole Agaard.

Q. Do you know where Captain Agaard is today?

A. In Buenos Ayres.

Q. When did you hear from him last?

A. About eight weeks ago.

Q. Did you receive a letter from him?

A. Yes.

Q. Where was the letter dated; what place was the letter dated?

A. From Buenos Ayres.

Q. Had you received letters prior to that from him?

A. Yes.

Q. All from Buenos Ayres?
A. No, not all. Some from England.
Q. How long has Captain Agaard been in Buenos Ayres?
A. He left England on March 17th.
Q. 1923?
A. 1923.
Q. So he has been in Buenos Ayres since April, 1923?
A. Yes.
Q. Did he say anything in any of his letters about as to whether he was coming to the United States?
A. No, sir.
Q. Is he retired?
A. Retired.
[fol. 42] Q. How old a man is he?
A. About 66, I should say.
Q. Where was the vessel Northern Star when you first went aboard it?
A. In Norfolk.
Q. Newport News, to be more exact?
A. Norfolk, off Sills Point.
Q. What date was it?
A. September 23rd.
Q. 1920?
A. 1920.
Q. Did you meet Captain Agaard on that date?
A. I did.
Q. On the vessel?
A. On the vessel.
Q. Did you hand him anything?
A. I did.
Q. What did you hand him?
A. The ship's mail, and also a letter, given me from the American Star Line office, containing a mortgage.
Q. Containing a mortgage?
A. Yes.

By the Court:

Q. What date was that?
A. (Mr. Young.) September 23rd.

By Mr. Young:

Q. Who handed you the letter?
A. Mr. Katzman handed me the letter.
Q. The gentleman here in Court?
A. Yes.
Q. Is this the copy of the letter handed to you by Mr. Katzman?
A. Yes.
Q. When was it handed to you?
A. September 22nd.

Q. 1920?
A. 1920.
[fol. 43] Q. Where was it handed to you?
A. In the American Star Line office.
Q. Which was where?
A. 25 Beaver Street, New York City.
Q. Were you present at the time when this letter was dictated?
A. I was.
Q. Who dictated it?
A. Mr. Katzman.
Q. I hand to you this letter—you say he handed to you also a mortgage?
A. Yes.
Q. I show you paper styled "mortgage" designated Exhibit B, attached to the stipulation in evidence as Exhibit 1. Take a look through it, look at the last page of it, and state whether that is the mortgage which was contained in the envelope containing the letter you just identified?
A. That is the one, sir.

Mr. Young: I now offer this letter in evidence.

Marked Petitioner's Exhibit A in evidence.

Q. So in handing the letter Exhibit A and the mortgage which you have just identified, to Captain Agaard, did you say anything to him?
A. I did, sir.

Mr. Stetson: Just a moment. What he said to the Captain I do not see how that is admissible.
The Court: I do not see how it binds.
Mr. Young: Captain Agaard was captain of the vessel. This evi-[fol. 44] dence is directed to show the compliance with the provisions of Section 30 of the Ship Mortgage Act, which requires a certified copy of the mortgage to be kept with the ship's papers.
The Court: You proved delivery of it.
Mr. Young: We wish to show not merely delivery alone, but the fact that it remained on board the vessel. I think the statute is to show evidence to the effect it was delivered on board the vessel and remained there.
The Court: What he said to the Captain does not prove that it remained there. His merely saying something to the Captain would not be proper. The law says what must be done. I sustain the objection.
Mr. Young: I respectfully except.

Q. Did Captain Agaard take the letter and mortgage from you?
A. He did, sir.
Q. Did you know what he did with it?
A. He put it away in his room, sir.
Q. Did he keep it in the safe?
A. In a deed box.

Q. Did you have the keys to the deed box?
A. I always did in port.
Q. That is so, either when the captain was on or off the vessel, you had the keys to the captain's room?
A. Yes.
Q. And also to the receptacle in which the deed box was kept?
A. Yes.
[fol. 45] Q. After September 22*th*, 1920, did you see the mortgage on board the vessel?
A. I did, sir.
Q. When did you leave that vessel?
A. I left the Northern Star May, 1921.
Q. You continued to be chief officer of this vessel from September, 1920 to May, 1921?
A. Yes.
Q. Did the Northern Star leave Norfolk shortly after September 23rd, 1920?
A. She left three days after I got there.
Q. Where did she go to?
A. Alexandria.
Q. Did you see the Northern Star before September 23rd, 1920, at the Port of New York?
A. No, sir.
Q. Do you know Captain Agaard's signature?
A. Yes.
Q. I show you this paper and ask you whether it bears his signature?
A. Yes, that is it.

Mr. Young: Paper dated October 31, 1922, identified as bearing Captain Agaard's signature I offer for identification.

Marked Petitioner's Exhibit B for identification.

Q. Referring to Exhibit B for identification—

Mr. Stetson: If you are not going to introduce this in evidence, I will not allow you to examine him on it.
Question withdrawn.

[fol. 46] Q. When you left the Northern Star in May, 1921, where did you go to?
A. Aboard the American Star as master.
Q. In May, 1921, was Captain Agaard still Captain of the Northern Star?
A. Yes.
Q. Who succeeded Captain Agaard as the master of the Northern Star?
A. Captain Anderson.
Q. Do you know when he succeeded him?
A. October.
Q. 1922?
A. 1922.

Q. Do you know Captain Anderson's signature?
A. Yes.
Q. I show you this paper, B for identification, and ask you whether it bears Captain Anderson's signature?
A. That is it, sir.
Q. Have you seen Captain Anderson's signature often?
A. I was chief mate with Captain Anderson for eight months, and I saw his writing practically every day I was with him.

Mr. Young: I offer this in evidence.
Mr. Stetson: I object.
Mr. Young: This is intended to show the mortgage remained on board the vessel throughout.
The Court: What is the objection.
Mr. Stetson: I object because it seems to me there is better evidence than that what documents were aboard the vessel. It seems to me there is better evidence than that. For instance the ship's log. That is better evidence.
[fol. 47] The Court: Captain Agaard is out of the country. I don't know about Captain Anderson.

Q. Where is Captain Anderson?
A. I do not know at the present moment, at least not for the last four weeks I have not seen him. I think he is at sea.
Q. Is he master of a vessel?
A. I cannot say. I expect he will be.
Q. The last you heard of him or saw him was he master of a vessel?
A. No, sir. He was doing nothing at that time.
Q. Where was he?
A. He was in New York. He was looking for a ship, the last I saw of him.
Q. Where does he live?
A. Portland, Maine.
Q. Did he tell you he was going to Portland, Maine, when you last saw him?
A. I missed him, and have not seen him.
Q. In the last four weeks?
A. Yes.
Q. Where did you customarily see him in New York?
A. Around the Customs House.
Q. Have you been to the Customs House in the last four weeks?
A. Pass it practically every day.
Q. And you have not seen Captain Anderson?
A. No.

The Court: I will take it.
Mt. Stetson: Exception.
Marked Petitioner's Exhibit B in evidence.

[fol. 48] Q. In November, 1920, while you were chief officer, was the mortgage which you have identified as a mortgage, which you delivered to Captain Agaard, on board the ship?
A. Yes.

Q. Who succeeded Captain Anderson as master of the Northern Star?
A. I did.
Q. When?
A. February the seventh.
Q. February 6th, 1923?
A. I took the papers over that day, but I really did not take charge of the ship until the seventh.
Q. In taking charge of the ship on February 7th, did you then sign a document?
A. I did, sir.
Q. I show you this document and ask you whether it bears both the signature of Captain Anderson as well as your own?
A. It does, sir.
Q. Did you deliver one like this to Captain Anderson?
A. I did, sir.
Q. And the following day you took charge of the ship?
A. I did.
Q. Did you personally look over the papers of the Northern Star?
A. Every one.
Q. After looking them over this list was made up and you signed your name thereto?
A. Yes.

Mr. Young: I offer that in evidence.
Mr. Stetson: Same objection.
The Court: I will receive it.
Mr. Stetson: Exception.

Marked Petitioner's Exhibit C in evidence.

[fol. 49] Q. How long did you remain master of the Northern Star?
A. Until sold.
Q. August 22nd, 1923?
A. Yes.
Q. Then what did you do?
A. Went back to the American Star as master.
Q. Are you master of the American Star now?
A. I am.
Q. In November, 1920, when the repairs by the Morse Dry Dock and Repair Company were being made, where were you?
A. Aboard the ship.
Q. Where was the ship while the repairs were being made?
A. To the best of my knowledge we were at Pier 1, Erie Basin.
Q. Was Captain Agaard on board the ship during that period?
A. Oh, yes.
Q. You saw the repairs being made?
A. I was aboard the ship at that time.
Q. Did you meet Mr. Garmey during those repairs?
A. Yes.

Q. Did you meet anybody from Morse Dry Dock and Repair Company during those repairs?
A. I think I must have, but I do not remember meeting them.
Q. Did you know a Mr. Hallock or Mr. Murray?
A. I know Mr. Hallock now, but I did not at that time.
Q. Is Mr. Hallock in Court?
A. I do not see Mr. Hallock.

Mr. Stetson: He is not here yet.

[fol. 50] Q. Did you talk to Mr. Hallock?
A. I might have done so, but I do not remember.
Q. Did you talk to Mr. Murray, if you know?
A. Not that I know.
Q. Did anybody from the Morse Dry Dock and Repair Company talk to you about these repairs?
A. I guess they must have because any work done with the deck I would have to look after it.

Cross-examination by Mr. Stetson:

Q. How long have you been going to sea?
A. About 21 years.
Q. Hold any license?
A. I hold a British master's license and an American master's license.
Q. On September 22nd, 1920, the Northern Star was here in the Port of New York?
A. Yes.
Q. You did not join the vessel here in New York, as I understand?
A. No, sir.
Q. But you did join the vessel the following day in Norfolk?
A. Yes.
Q. You have testified that sometime during the 22nd of September you went to Mr. Ginsburg's office and received this mortgage referred to?
A. Yes.
Q. And the mail of the vessel?
A. Yes.
Q. What time of the day was that?
A. Afternoon.
[fol. 51] Q. What time in the afternoon?
A. I guess somewhere between two and three in the afternoon.
Q. Two and three in the afternoon of the 22nd?
A. Yes.
Q. And you received certain instructions from Mr. Ginsburg or other parties in the office, and in pursuance of those you went to Norfolk?
A. Yes.
Q. What time did you get to Norfolk?

A. Somewhere about nine o'clock in the morning.
Q. What time did the vessel leave New York, if you know, the Northern Star?
A. I think somewhere around noon, I missed her a few minutes.
Q. Do you know what time the Northern Star arrived in Norfolk?
A. I guess between 1 and 2 o'clock that day.
Q. In the afternoon?
A. Of the 23rd.
Q. What time did you get aboard?
A. About 3 o'clock.
Q. You immediately, as you have testified, gave these papers, the mail and the envelope containing this mortgage to the captain of the vessel?
A. I did, sir.
Q. You were impressed with the importance of this fact, that it was necessary to deliver these papers personally to the captain?
A. Yes.
Q. From your experience, and knowledge of the duties of an officer of a vessel, would you say that the fact of the taking aboard, bringing aboard of this mortgage, and surrender of the same to the [fol. 52] captain, would be a proper matter for entry in the ship's log?

Mr. Young: I object, requiring this witness to state conclusions of law.
The Court: He might state the custom, if he knows of any, but you phrased it a little differently. I sustain the objection. If he can prove the custom that is one thing.

Question withdrawn.

Q. Do you know if there is any custom in regard to the making of entries in logs of documents affecting the vessels?
A. No, sir.
Q. You do not know of such?
A. No sir, not to my knowledge.

Redirect examination by Mr. Young:

Q. Did you meet on board the vessel Mr. Katzman?
A. Mr. Katzman came on board the vessel after I arrived.
Q. He was on the vessel?
A. Yes.
Q. With you at the same time?
A. Yes.
Q. You were there before he was?
A. Yes.
Q. Did Mr. Katzman speak to Captain Agaard?
A. I believe he did, sir.
Q. In your presence?
A. Not in my presence, sir.

[fol. 53] SELIG J. KATZMAN, being called as a witness on behalf of Petitioner and duly sworn, testified as follows:

Direct examination by Mr. Young:

Q. In 1920, were you connected with the American Star Line, Inc.?

A. Yes.

Q. In what capacity?

A. I was in charge of the purchasing department and also auditing.

Q. Did you style yourself, or were you styled, manager of the company?

A. I really had no official title, to be frank about it. I was known as purchasing man, and also had charge of the accounting department.

Q. Up to September, 1920, how long had you been employed by that firm?

A. I joined the company some time in July, 1919.

Q. When did you cease working for the company?

A. Still with them.

Q. The company as a company—not in the hands of——

A. December 22nd, 1920, then the company went into the hands of the receiver.

Q. Since that time you have been working for the receiver?

A. Yes.

Q. Were you familiar with the movements of the vessel Northern Star in 1920?

A. Yes.

Q. Do you know when in the month of September, 1920, the Northern Star came into the Port of New York?

A. September 21st.

Q. How long did she stay at the Port of New York?

A. She came late in the afternoon, sailed the following day sometime at noon.

[fol. 54] Q. Where did she sail for?

A. Norfolk, Hampton Rhoads.

Q. Before she sailed did you go on board the vessel?

A. Yes.

Q. Whom did you see?

A. The Captain, the rest of the crew.

Q. Did you speak to the captain?

A. I did.

Q. Did you, on September 21, 1920, at that time have with you a certified copy of a mortgage on that vessel?

A. Yes.

Q. I show you this paper, which is styled Exhibit B, attached to the stipulation, Exhibit 1, and ask you whether this is the very mortgage you had with you at the time?

A. Yes, sir.

Q. Did you hand that to the captain at the time?

A. I did not.

Q. Why didn't you?

A. I was supposed to go with the captain on the steamer, to Norfolk, but the first officer wanted to be paid off at New York, so I left the ship with the first officer and paid him off at the office and I forgot to give that to the captain.

Q. Who was the first officer?

A. Some Norwegian, I do not recall his name.

Q. This first officer was the one who was succeeded by Captain Nicholas as the first officer?

A. Yes.

By the Court:

Q. What date did she come in?

A. The twenty-first.

[fol. 55] By Mr. Young:

Q. You say she left the Port of New York on the 22nd?

A. Yes, the 22nd.

Q. Then on that date, September 22nd, you wrote the letter, Exhibit A?

A. Yes.

Q. Was it done in the presence and hearing of Captain Nicholas?

A. Yes.

Q. Did you hand this letter with a certified copy of mortgage which you just identified to Captain Nicholas?

A. I did.

Q. Did you give him instructions?

A. I impressed on him the importance of this particular paper, and told him the first thing he gets on board to give it to Captain Agaard and emphasize the fact to keep it aboard the ship at all times, and show it to anybody who desires to see it.

Q. And you handed that and the letter to Mr. Nicholas?

A. Yes.

Q. Did he leave for Norfolk?

A. Yes.

Q. Did you leave for Norfolk?

A. I left on the midnight train.

Q. What time did he leave?

A. I believe 8 o'clock.

Q. You came to Norfolk the following day?

A. I did.

Q. Came aboard the vessel?

A. Yes.

Q. See Captain Agaard and Mr. Nicholas there?

A. Yes.

Q. Speak to Captain Agaard?

A. Yes.

Q. And speak to Mr. Nicholas?

A. Yes.

Q. At the time you spoke to Captain Agaard did he have in [fol. 56] possession the mortgage and letter?

A. Yes, the first thing I did when I saw the captain was ask if he received that paper, knowing the importance of that. I asked if he received it. He said yes, "Captain Nicholas handed it to me."

Q. What paper?

A. The mortgage.

Q. Did you see it in the hands of Captain Agaard?

A. Yes, he showed me what I referred to.

Q. Where was the mortgage when you saw it?

A. He had it together with the rest of the ship's papers.

Q. In the captain's room?

A. Yes.

Q. How long did you stay aboard the steamer Northern Star September 23rd?

A. Until late in the evening, and went to the hotel, and I remained with the ship until she sailed.

Q. When did she sail?

A. A few days later.

Q. She left for Alexandria?

A. Alexandria.

Q. Do you remember the voyage prior to this particular voyage we have just talked about, of the Northern Star?

A. Yes.

Q. Have you a memorandum, or can you testify without referring to a memorandum, the date when the last voyage commenced and ended?

A. I had better refer to the memorandum; I have a number of ships. I got this from the itinerary records of the office.

Q. State when the Northern Star left the United States on its immediately previous voyage?

A. She left Norfolk August 5th, 1920, and arrived at Stockholm August 23rd.

[fol. 57] Q. 1920?

A. 1920. Then she left Stockholm September 3rd, 1920, and arrived in New York September 21st, 1920.

Q. When you say she left Norfolk August 5, 1920, had she come to Norfolk from New York, or had she gone direct from Norfolk on her previous voyage?

A. I really do not know.

Q. New York was her home port?

A. Yes.

Q. And was vessel documented here in New York?

A. Yes.

Q. On August 11th, 1920, therefore, the vessel was on high seas?

A. Yes.

Q. And the very first time after August 11th, 1920, that the vessel came to the Port of New York was September 21st, 1920?

A. Yes.

Q. Did you know any of the people connected with the Morse Dry Dock and Repair Company?

A. No, sir.

Q. Did you personally ever have contact with them regarding repairs?

A. No, sir.

Q. If you do not understand my question say so. I mean did you ever personally meet any of the gentlemen connected with the Morse Dry Dock and Repair Company?

A. Not at that time.

Q. You mean subsequent thereto?

A. Subsequent to this I did.

Q. When you say that time you mean November, 1920?

A. Yes sir.

Q. In November and prior to November you had never met any of them?

A. No.

Q. Had you personally supervised the payment of bills to the Morse Dry Dock and Repair Company prior to November, 1920?

A. Yes.

[fol. 58] Q. How were those bills paid?

A. Ordinarily check; just made out a check and paid them in the ordinary way.

Q. Were the bills made out to the American Star Line?

A. Ordinarily they had a routine to go to McFarlane and Garmey to check out the work, and then they were referred to the office and I checked the extensions and amount of the bill.

Q. And then it would be paid by the check of the American Star Line?

A. Yes.

Q. Would you be the one to see to the payment?

A. Yes.

Q. Who had authority to sign checks for the American Star Line?

A. Mr. Ginsburg.

Q. Did you have authority?

A. No, sir.

Q. Were you an officer of the company?

A. At that time, no sir.

Q. Who was the treasurer of the company?

A. I think Mr. Charles Kanner.

Q. Was he also the secretary of the company?

A. Yes.

Q. So you were not either secretary, an officer, or director of the company?

A. No, sir.

Q. Was Mr. Moses Ginsburg the President of the Company?

A. Yes.

Q. Had he been president all along during the period you were employed there?

A. Until the receiver was appointed.

Q. Was the vessel Northern Star under charter to the Kinsley Steamship Company in September 1920?

A. Yes.

Q. When the vessel came to New York on September 21, 1920, [fol. 59] had she come from Stockholm?

A. Yes.

Q. And in ballast at the time?

A. Yes.

Q. Did she stop at the Port of New York to replenish her bunkers?

A. Yes.

Q. Did she proceed from New York to Norfolk for the purpose of taking on cargo for Alexandria?

A. Yes.

Q. How much time elapsed in all that the vessel Northern Star was at the Port of New York between September 21st and September 22nd?

A. She arrived September 21st about 5 o'clock.

Q. And cleared the following day?

A. Yes, too late to clear the same day.

Q. Was she cleared before noon, September 22nd, 1920?

A. Yes.

Cross-examination by Mr. Stetson:

Q. You are at present in the employ of the receiver?

A. Yes.

Q. Do you know where the logs of the Steamship Northern Star are now, covering the period around November, 1920?

A. Suppose in the office.

Q. Office of the receiver?

A. Office of the receiver or aboard the ship. I do not recollect exactly.

Mr. Young: I offer in evidence ten promissory notes of date September 30, 1919, made by the American Star Line, Inc., numbered [fol. 60] in regular order, series of ten, from Number 1 to 10, constituting the amount of the mortgage which is attached to the stipulation. As to Number 1, it is on file in the registry of this Court, and is the particular note deposited by the purchaser, and delivered to the Marshal on the sale of the vessel. I cannot offer them physically.

The Court: That will be offered but not marked.

Mr. Young: These nine run in seriatim order. I wish to have them marked in order from 2 to 10 and the other one will be considered in evidence.

The Court: It is, and is not marked.

Marked Petitioner's Exhibit D in Evidence.

Mr. Young: Those make a total of $1,217,437.50 and they are specifically enumerated and set forth in toto on the second page of the mortgage.

Mr. Stetson: Mr. Hallock has not arrived, and I will not ask the Court to wait for him. His testimony is corroborative, and I will rest without him. The only thing is, Mr. Garmey would like to change his testimony on one thing.

[fol. 61] JOHN GARMEY recalled:

Examination by Mr. Stetson:

Q. State in what respect you desire to correct your testimony?
A. I stated the repairs were done at the Morse Dry Dock, but the captain remarked in regard to the repairs that they were done at Erie Basin. That is right.

By the Court:

Q. And that refreshes your recollection and you know it was Erie Basin and not the Morse Dry Dock and Repair Company?
A. Yes.

By Mr. Young:

Q. How far were the yards of the Erie Basin from the yards of the Morse Dry Dock and Repair Company?
A. About a mile and a half, around the road.
Q. Did you see Mr. Hallock here this morning in the court room?
A. No.
Q. Did you see him outside the court room?
A. No.

Mr. Young: I will call Mr. Hallock, if he is here.
Mr. Stetson: He is not here. I would call him if he was here.
Mr. Young: Is Mr. Murray here?
(No response.)
Mr. Stetson: He is not here. He is tied up on a big job and I know it will be difficult for him to get here.

[fol. 62] SELIG J. A. KATZMAN recalled by petitioner:

By Mr. Young:

Q. During all the period you were purchasing agent and auditor of the American Star Line, Inc., did you ever pledge the credit of any of its vessels?

Mr. Stetson: I object.
The Court: That is a conclusion, whether he pledged the credit of the vessel. Sustained.

Q. Did you ever say to the Morse Dry Dock and Repair Company, or any other concern that supplied repairs or did any work on any of the vessels, that the credit of the vessel was pledged as security for their claims?

Mr. Stetson: I object.

The Court: Sustained. What did you say, if anything, to the Morse Dry Dock.

Mr. Stetson: He already testified he did not talk to anybody.

The Court: Let him testify whatever he said about the work.

Q. Did you ever say anything at all to anybody of the Morse Dry Dock and Repair Company about the work being sued for here?

A. No.

[fol. 63] Q. Did you have any authority from the American Star Line to pledge the credit of the vessel?

Mr. Stetson: I object.

The Court: He said he never did anything at all.

Mr. Young: I presume it will be admitted that none of the promissory notes marked in evidence have been paid.

Mr. Stetson: I do not imagine so.

Mr. Young: I want it clear on the record the mortgage remains unpaid, although I think it sufficient if the notes are put in.

The Court: Any question about the notes being paid?

Mr. Stetson: No, I do not object to it.

ARGUMENT OF COUNSEL

Mr. Stetson: I would like to offer in the nature of rebuttal and ask the Court to take judicial notice of, and read into the record, certain extracts from the hearings before the Committee on Merchant Marine and Fisheries, which considered The Ship Mortgage Act, the purpose being to maintain the contention of the Libellant in this case that the three provisions of the Ship Mortgage Act, requiring the mortgage to be recorded, to be placed on board the vessel and carried there, and be endorsed on the ship's papers are mandatory. [fol. 64] In the last analysis I know of no better way of arriving at the construction of the Act than the discussion before the Committee, and I would like to read the discussions into the record, or if your Honor will allow me to submit certain extracts and the other side submit certain extracts I am agreeable.

Mr. Young: I unhesitatingly object. That cannot be the means or the way the Court reaches a conclusion. The Court may reach a conclusion by the language of the Statute.

The Court: The Court, to construe the statute, may consider the discussion at the time. It is the customary course.

Mr. Young: Yes, on a question of constitutionality, and on the question of whether a certain thing has been done or not done; 1. Its recording; 2. A certified copy was on the vessel; 3. That it was

endorsed on the ship's papers. And the stipulation provided June, 1921. And the rest is a question whether those things comply with the Statute. No aid to construction is required. It is a question of law.

The Court: Is this discussion of people who appeared before the Committee or members of the Committee?

Mr Stetson: Discussion of the Merchant Marine and Fisheries Committee, at which the terms of this Bill was discussed.

The Court: That seems to be going further. Any discussion of the Committee and the members——

Mr. Stetson: It is a discussion of the members and evidence and testimony.

[fol. 65] The Court: You had better sit down and see what you can agree on and then hand it up.

Mr. Young: I will, for the sake of the record, object to any such thing to be offered, but if your Honor will rule you will permit an offering by members of the Committee I can, with Mr. Stetson, cull out what he thinks he ought to put in and let it go in the record. But I submit, nothing but what members of the Committee said can be pertinent. Whatever someone on the floor said addressing the Committee, or a person outside the Committee, cannot be proper to swerve your Honor's opinion.

The Court: I think that is right.

Mr. Stetson: I would like to get clear. My purpose in offering this report and extracts is to show chiefly the interpretation placed on this Act by Mr. Campbell, who was at that time the General Counsel of the Shipping Board and who prepared this bill, and who was before this Committee on this bill. Now the arguments and discussion are between the members of the Committee and Mr. Campbell. Mr. Campbell has placed certain constructions and given his opinion in no uncertain terms and I maintain that is proper as aiding in the construction of any ambiguity; not that we recognize any ambiguity in it—it is plain as can be, and the provisions are mandatory—but the other side has raised the question of ambiguity and I contend anything that clears that ambiguity should be considered by the Court.

[fol. 66] The Court: I am not bound by Mr. Campbell's opinion. I think you are going wide afield. My opinion is you are entitled to present to me the report of the Committee and I am willing to go further than that. I am willing to allow you to offer anything that the members of the Committee said in that that may clarify that report and show what they had in mind but what some person who held no official position, and who was simply there as a witness and addressing the Committee that will have no weight with me in construing the statute. They could say anything they liked. I do not know what Mr. Campbell's position was, or responsibility was. He may have been advocating as a counsel, and to hold counsel's advocacy should aid me——

Mr. Stetson: Can it be left that we may submit to your Honor, for the purpose of evidence, such extracts as you indicated, just from members and from the Committee itself?

The Court: Yes.

Mr. Young: I will take an exception and ask before anything is submitted I be given an opportunity to look at it.

The Court: I understood you would both look at it.

Mr. Young: Yes. How is it to be submitted?

The Court: Why don't you write out what you agree on and have it offered and make it an exhibit in the case and it will be part of the record and have a number.

(Here follows Exhibit 1-A, marked side folio pages 67, 68, 69, and 70)

[fol. 71] PETITIONER'S EXHIBIT 1-B

Preferred Mortgage to United States of America

This mortgage made as of the 30th day of Dec., in the year one thousand nine hundred and nineteen, between American Star Line, Inc., a Corporation duly organized and existing under the laws of the State of New York, party of the first part, with an office at 23-25 Beaver St., New York, N. Y., and United States of America, party of the second part, acting by and through the United States Shipping Board, Witnesseth:

The party of the first part, sole owner of the American steamship "Northern Star" ex "Waterbury" (hereinafter called the "vessel"), Official Number 219134 of about 5174 tons gross and 3283 tons net register, which vessel is more fully described in the certificate of last registry, a true and correct copy of which is hereto annexed, being justly indebted to the United States of America, party of the second part, acting by and through the United States Shipping Board, in the sum of 1,217,437.50 upon the purchase price of the vessel, has for the purpose of securing the payment of said debt and interest thereon, granted, bargained, sold and mortgaged and by these presents does grant, bargain, sell and mortgage unto the said [fol. 72] party of the second part and its assigns the whole of the vessel, together with all her engines, boilers, machinery, masts, bowsprits, boats, anchors, cables, rigging, tackle, apparel, furniture, all other appurtenances thereunto appertaining and belonging, and all the earnings, income, revenue, rents, issues and profits of the vessel, and also any and all additions, improvements and replacements hereafter made in or to the vessel or any part thereof, or in or to her equipment and appurtenances aforesaid,

To have and to hold the vessel and any and all such before-mentioned appurtenances, earnings, income, revenue, rents, issues and profits, additions, improvements and replacements unto the said United States of America, and its assigns, to the sole and only proper use, benefit, and behoof of the said United States of America, and its assigns forever:

Provided always, and the condition of these presents is such, that if the said party of the first part shall pay or cause to be paid, to the

67

COPY

Morse Exhibit 1-A

PLEASE REFER TO BILL No. 37989

BROOKLYN, N. Y. November 26,1920

S. S. "NORTHERN STAR" & OWNERS

MacFarlane & Carney
32 Broadway

Morse Exhibit 1-A

NEW YORK OFFICE 17 BATTERY PLACE ADDRESS ALL COMMUNICATIONS TO MAIN OFFICE FOOT 56TH ST. BROOKLYN, N. Y.

CABLE ADDRESS PYROSION, N. Y. CODES SCOTT'S, WATKINS & A. B. C. 5TH EDITION TELEPHONE 5100 TO 5106 SUNSET CONNECTING ALL DEPARTMENTS

MORSE DRY DOCK & REPAIR CO.

ENGINEERS, MACHINISTS & BOILER MAKERS

EXCELLENT FACILITIES FOR DOCKING AND REPAIRING VESSELS

FOOT 56TH TO 57TH STS.

1920
Nov. 22" to Nov. 26"

Putting main throttle valve in good working order by opening up, taking spindle to shop, and facing one side off, and freeing operating gear. Repairing bottom cover on throttle valve. Tapping out cover and installing tapped out brass plug.
Opening up main air pump and drawing air pump bucket. Refastening after spring bearing. Generally overhauling dynamo and making one new slipper for same.
Remetalling three sets of bearings, lifting crank shaft, and trying in lathe, and afterwards reconnecting.
Remetalling bottom end brasses for blower engine and refitting. Facing up valves on main feed pumps.
Grinding in main and aux. stop valves and making tight. Work on aux. stop valves done in overtime.
Grinding in two steam and two exhaust valves for deck line and making tight (Overtime).
Renewing four new pins and one bushing for steering engine.
Repairing two side lights, and installing one resistance in pilot house. Repairing two connections on after bulkheads for cargo lights. Furnishing 12 valves for Edward's air pump. Facing up three spare check valves.
Repairing exhaust line on bilge pump line (overtime.) This consisted of renewing one ell and 1 nipple.
Opening up main aux. stop valve, and installing new seat (overtime). Renewing wheels on windlass friction gear. Repairing hand rails on fore deck. Caulking 12 rivets, (leak in forepeak).
Repairing one fire hose rack on fore deck.
Fitting 2 sets of couplings to rubber hose (couplings renewed). Repairing cargo blocks.
Fixing couplings on fire hose (couplings renewed).
Locks on firemen's lockers.

AS PER CONTRACT $1,045.00

G-11-10-23

PLEASE REFER TO BILL 28099

COPY

BROOKLYN, N. Y.

November 27, 1920

S.S. NORTHERN STAR & OWNERS

McFarlane & Germey

Exhibit

NEW YORK OFFICE 17 BATTERY PLACE ADDRESS ALL COMMUNICATIONS TO MAIN OFFICE FOOT 56TH ST. BROOKLYN, N. Y.

CABLE ADDRESS PYRODOCK, N.Y. CODES SCOTT'S, BENTLY'S A. B. C. 5TH EDITION TELEPHONE ALSO TO 57TH ST. CONNECTING ALL DEPTS.

MORSE DRY DOCK & REPAIR CO.

ENGINEERS, MACHINISTS & BOILER MAKERS

EXCELLENT FACILITIES FOR DOCKING AND REPAIRING VESSELS

FOOT 54TH TO 57TH STS.

1920 Nov. 20 to Nov. 27			Removing damaged air pump bucket from ship to shop and repairing bucket as directed and afterwards returning same to steamer.				
	5-1/8	days	Machinist	10.96	56.17		
	3-3/4	"	" Helper	8.32	31.20		
	2-3/8	"	Rigger	10.96	26.03		
	1/2	"	Foreman	12.00	6.00		
	4	hrs.	Wels light	2.50	10 40		
	1/4	"	Crane	10 00	2 50		
	800	lbs.	Sheet Lead	20	160 00		
							292,30
			Furnishing material and labor and installing and connecting up new hand fire pump.				
	8	days	Pipefitter	10 96	87 68		
	1/4	"	Foreman	12 00	3 00		
	2	hrs.	Pipe machine	2 30	4 60		
	2	5x6"	Galv. nipple	3 27	6 54		
	1	5x5x1-1/2	screwed tee	6 15	6 15		
	48	ft.	Galv. Pipe	50-3/4	24 36		
	2	2"	Galv. 45 deg. ells	1 19	2 38		
	1	2-1/2	Flush bushing	29-1/4	29		
	2	2"	Galv. el. nipples	52-3/4	1 06		
	1	2"	Brass gate valve		12 48		
	2	2"	Galv. union	1 53	3 06		
	4	2"	Galv. mall tee	1 31	5 24		
	1	2"	" " plug	26-3/4	27		
	3	2"	" " ells	1 06	3 18		
	3	2x2x1/2	" " bushing	29-1/4	88		
	1	lb.	Blk. rubber	46	46		
	2	2x2-1/2	Galv. nipples	52-3/4	1 06		
	2	2x3	" "	91-3/4	1 84		
	2	2x4	" "	91-3/4	1 84		
	2	2x5	" "	1 01-1/4	2 03		
	2	2x6	" "	1 19	2 38		170 71
			Renewing wire screens on vent pipes from fuel oil tanks.				
	7-1/4	Days	Pipefitter	10 96	79 46		
	1-3/8	"	Sheet metal worker	10 96	15 07		
	3/8	"	Foreman	12 00	4 50		
			Forward....		99 03		463,01

P.
C.

COPY BOUN

COPY

#28099

Exhibit

S.S. Northern Star & Owners.....2

		Forward		99.63	463.06
6	Hrs.	Pipe Machine	3 50	21.00	
4-1/2	Ft.	Blk. pipe	1 26	5 67	
6	sq. ft.	Brass wire cloth	84	5 04	
3	lbs.	1/2 x 1/2 solder	46	1 38	
1	"	Muriatic acid	07	07	
1/2	Bag	Charcoal	1 50	75	132 94

Repairing, testing and adjusting 1 steam gauge

3/8	days	Machinist	10 96	4 11	4 11

Disconnecting and taking to shop and repairing bilge pump ram as directed also making and machining new rod for same, afterwards returning same to ship and connecting in place.

3-3/8	days	Machinist	10 96	36 99	
1	"	" Helper	8 32	8 32	
11	hrs.	Lathe	2 25	24 75	
2	"	Drill	1 00	2 00	
257	lbs.	Mild Steel	11	28 27	100 33

Cartage on all repairs to and from vessel at Pier 4 Erie Basin, N.Y. 15.00

Carfare to and from vessel at Pier 4, Erie Basin, N.Y. 1.00

Expense of Employe's Liability Insurance, 5% on Labor 17 93

$734 37

12/3/20-FF
6-10-11-23

CLOSE IN CENTER

PLEASE REFER TO BILL NO. 27671
IN CORRESPONDENCE AND SHIPPING

MAC FARLANE & GARMEY ..... BROOKLYN, N. Y. November 14,1920.
32 Broadway, N.Y.C. Exhibit 14

MAIN OFFICE AND PLANT
FOOT OF 54TH STREET TO 57TH STREET
BROOKLYN, N. Y.
TELEPHONE
NEW YORK OFFICE
17 BATTERY PLACE
TELEPHONE

MORSE DRY DOCK & REPAIR CO.
ENGINEERS, MACHINISTS & BOILERMAKERS
EXCELLENT FACILITIES FOR DOCKING AND REPAIRING VESSELS

Services taking Mr. Garmey from yard to S. S. "Northern Star" off Quarantine and return to yard $22.50

G-10-11-23

CREDIT MEMORANDUM

BILL NO. 28099

Credit on account of sheet lead used on air pump bucket having been charged as new sheet lead, whereas scrap lead was used.

800 lbs. @ .12.....$96.00

said party of the second part, or its assigns, the debt aforesaid, with the interest thereon, at the time or times and in the manner following, to wit, by paying on the respective dates of their maturity each and every of ten promisory notes numbered as follows and of the following amounts and maturities:

[fol. 73]

Number		Amount	Maturity
1.	For	202,906.25	June 30, 1920
2.	"	202,906.25	Dec. 30, 1920
3.	"	101,453.12	June 30, 1921
4.	"	101,453.13	Dec. 30, 1921
5.	"	101,453.12	June 30, 1922
6.	"	101,453.13	Dec. 30, 1922
7.	"	101,453.12	June 30, 1923
8.	"	101,453.13	Dec. 30, 1923
9.	"	101,453.12	June 30, 1924
10.	"	101,453.13	Dec. 30, 1924

(all of which notes, save for their respective amounts and dates of maturity are in form and substance as follows:

"No. 1.

$202,906.25. —— —, 19—.

On or before the 30th day of June, 1920, for value received, the undersigned promises to pay to the United States of America, or order, at the office of the United States Shipping Board, Washington, D. C., in gold coin, or its equivalent in funds current in New York City, the sum of Two hundred two thousand nine hundred twenty-six Dollars and twenty-five cents, and to pay interest thereon, from the date hereof, in like coin, or such equivalent, at the rate of — per cent, per annum, payable semi-annually.

This note is one of a series of 10 notes totalling $1,217,437.50 of like form and tenor, save for their respective amounts and dates of [fol. 74] maturity; all given in payment for the American steel steamer Waterbury, Official Number 219134. Each of the said notes is secured by a first mortgage upon the vessel, which mortgage is dated Dec. 30, 1919, and this note is issued, negotiated and received by any holder hereof subject to all the terms and conditions of said mortgage, and secured thereby to the same extent as if said mortgage were set out herein in full. If default be made in the prompt and faithful payment of this or any of said notes, or in the performance of any of the covenants and conditions of said mortgage, this note shall immediately become due and payable.

In the event of suit to collect this note, the undersigned agrees to pay reasonable attorney's fees.")

and by paying interest on all of said notes semi-annually, and if said party of the first part shall duly perform all the agreements, covenants and conditions hereinafter set forth, then these presents shall be void and of no effect, subject however, to the covenants and agreements hereinafter contained; and the said party of the first part hereby agrees to pay the debt aforesaid, and interest thereon, and to fulfill and perform each and every one of the covenants, agreements and conditions herein contained.

[fol. 75] Article I—Particular Covenants of the Party of the First Part

The party of the first part covenants and agrees as hereinafter in this Article set forth:

Section I. At its own expense, so long as any of the notes hereunder and hereby secured are outstanding, to keep the vessel insured in an amount in dollars, lawful money of the United States, at least equal to 25% more than the amount remaining unpaid, the policy valuation not to exceed the amount insured, with responsible underwriters in good standing, approved by the party of the second part, under the American Hull Underwriters' Association form of marine insurance policy insuring against the usual risks covered by such policy including the Four Fourths Running Down Clause and the Inchmaree Clause, and with a policy franchise or deductible average of not exceeding 5% of the insured value, or under such other form of policy as the party of the second part may approve; disbursement insurance to such amount as underwriters will allow being permitted; to keep the veessel fully entered in a protection and indemnity association or club in good standing in both protection and indemnity classes, or covered in the amount above specified by protection and indemnity clauses of like effect in marine insur-[fol. 76] ance policies; to keep the vessel insured in like amount of war risk insurance while engaged in trans-Atlantic or United Kingdom or European Coastwise Service, or whenever or so long as the party of the second part shall request that such war risk insurance be carried. All insurance by its terms shall be payable to the United States Shipping Board for the party of the first part and the party of the second part as their interests may appear, and the policies and binders therefor shall be delivered to the party of the second part, except that if the vessel is entered in a protection and indemnity association or club, the requirements as to delivery of policies and binders therefor to the party of the second part shall not be applicable, but a certificate of the brokers arranging the insurance with the club shall be furnished the party of the second part showing compliance with the requirements hereof, and except that in the event of partial loss, if the party of the first part is not in default under this mortgage, the party of the second part shall consent to the payment by the Underwriters direct of all bills incurred for repairs and salvage or similar services which may be covered by said insurance.

Section II. Not to do nor voluntarily suffer nor permit any act to be done whereby any insurance is or may be suspended, impaired or defeated, nor to suffer nor permit the vessel to engage in any voyage or to carry any cargo not permitted under the policies of insurance in effect, without first covering the vessel to the amount [fol. 77] herein provided for by insurance satisfactory to the party of the second part for such voyage or the carriage of such cargo, nor cause, suffer nor permit the vessel while subject to this mortgage to

be operated in any manner contrary to any reasonable rules and regulations which the United States Shipping Board may from time to time prescribe for the vessel and other vessels sold or leased by the said Board under similar conditions.

Section III. Not to suffer nor permit to be continued any lien, encumbrance or charge which has or might have priority over this mortgage of the vessel to the party of the second part; but in due course, and in any event within fifteen days after the same becomes due and payable or enforceable against the vessel, to pay, discharge or make adequate provision for the satisfaction or discharge of all lawful liquidated claims or demands which if unpaid, might, in equity, in admiralty, at law or by any statute of this or any other nation where the vessel may be navigating or berthed, have such priority over this mortgage, or might operate as a lien, encumbrance or charge upon the vessel or cause detention in port, provided, however, that this provision shall not apply to the extent that there may be pending on behalf of either of the parties hereto with solvent underwriters, not yet having been paid or rejected, a claim for reimbursement on account of the matter upon which any such lien is alleged to be founded nor to the extent that the party of the second part has insurance or has received the proceeds thereof properly [fol. 78] applicable as reimbursement on account of such matter or to the payment or discharge thereof; always, however, subject to the condition that the vessel be discharged or released from any libel, attachment or other detention under process or color of legal authority within fifteen days from the time when the same attaches.

Section IV. At all times, at its own expenes, to maintain and preserve the vessel in as good condition, working order, and repair as at the date of the execution of this mortgage, so far as may be practicable, ordinary wear and tear and depreciation excepted, and to keep the vessel in such condition as will entitle her to the highest classification and rating for vessels of the same age and type in the American Bureau of Shipping or Lloyds (British) Register of Shipping; and annually, and at such other times as the party of the second part may determine, to furnish to the party of the second part certificates by one of such bureaus that such class has been maintained.

Section V. At all times to afford the party of the second part or its authorized representatives full and complete access to the vessel for the purpose of inspecting the same and her cargoes and ship's papers and at all reasonable times to permit the party of the second part or its duly authorized representatives to examine its minutes, books of account, records, files and documents. It is hereby agreed [fol. 79] that in the event the party of the second part from any such examination shall deem its interest in the vessel to be any risk or hazard, it may, at the expense of the party of the first part, place its authorized representative upon the vessel, with authority to be advised of all operations and records thereof.

Section VI. To carry a properly certified copy of this mortgage with the ship's papers; and to take such other appropriate steps, as designated to it by the party of the second part from time to time or required by the circumstances as will give notice to the world that the party of the first part's right, title and interest in the vessel is subject to this mortgage, and that the party of the first part has no right, power nor authority to suffer or permit to be imposed on or against the vessel any liens or claims which might be deemed superior to or a charge against, the interest of the party of the second part in the vessel.

Section VII. To pay and discharge, when due and payable from time to time, all taxes, assessments and governmental charges, fines or penalties lawfully imposed on the vessel or upon the income and profits thereof.

Section VIII. To reimburse the party of the second part promptly, with interest at the rate of six per cent per annum, for any and all expenditures which the party of the second part may make from time to time in providing such protection in respect to [fol. 80] insurance, discharge of liens, and taxes, repairs and other matters as the party of the first part is obligated under this Article to provide, but fails to provide; but the party of the second part shall be under no obligation to the party of the first part to make any such expenditures nor shall the making thereof affect the party of the first part's default in that regard.

Section IX. Not to make any sale, lease or other transfer of the vessel or of any interest therein without the written consent of the party of the second part first obtained, and such written consent to any one such transfer shall not be deemed a waiver of this provision in respect to any subsequent proposed transfer. Any such consent may be upon the condition that the transferee shall together with the party of the first part jointly and severally assume all obligations of the party of the first part under this mortgage and upon its said notes, but the party of the first part may for uses lawful for American vessels and subject to all the provisions of this mortgage, charter the vessel to citizens of the United States as defined in the "Merchant Marine Act, 1920," and, so far as permitted by regulations of the United States Shipping Board to persons not citizens of the United States, and further provided that the party of the first part may mortgage or pledge the vessel to American citizens of the United States as defined in the "Merchant Marine Act, 1920," subject, however, to the prior lien and provisions of this mortgage.

[fol. 81] Section X. To comply with and satisfy the requirements of the "Ship Mortgage Act, 1920" so as to establish and maintain this mortgage as a preferred mortgage under said act.

Section XI. In the event that this mortgage or said notes, or any provisions thereof, be deemed invalidated in whole or in part by any present or future law of the United States or any decisions of any authoritative court thereof, to execute such other or further instru-

ment as in the opinion of counsel for the party of the second part will carry out the true intent and spirit of this mortgage. From time to time to execute such further assurances as in the opinion of such counsel may be required to safeguard the rights of the parties hereunder and carry out the spirit of this mortgage.

Article II—Default

Section I. In case any one or more of the following events herein termed events of default, shall happen, viz:

(a) default for more than fifteen days after it falls due in the payment of any instalment of interest on any of said notes; or

(b) default in the due and punctual payment of the principal of any note when the same shall become due; or

[fol. 82] (c) default in the due and punctual performance of any provision of Section I and/or Section III of Article I thereof; or

(d) default for more than fifteen days after notice in writing given by the party of the second part in the prompt and faithful performance of any of the covenants, agreements or conditions herein contained; or

(e) the said party of the first part shall sell or attempt to sell the vessel or any part thereof or transfer the flag of the vessel without the written consent of the said party of the second part, or the vessel shall be libeled or levied upon or taken by virtue of any attachment or execution against the said party of the first part or otherwise subjected to lien or claim and not released within fifteen days as herein provided, or the said party of the first part shall remove or attempt to remove the vessel beyond the limits of the United States save on voyages with the intention of returning to the United States, or if legal proceedings be instituted to place the vessel or any of the property of the party of the first part in the hands of a receiver, custodian or trustee in bankruptcy or insolvency;

then and in each and every such case the party of the second part thereupon may:

[fol. 83] (a) Declare all outstanding notes to be immediately due and payable, whereupon all of said notes shall, upon such declaration, become due and payable immediately and shall bear interest thereafter at the rate of six per centum per annum upon the amount of principal and interest then due thereon;

(b) Recover judgment for any amount due upon said notes or any of them, either by their terms or by virtue of such declaration, and collect the same out of any property of the party of the first part;

(c) Retake the vessel wherever the same may be found, and hold, lease, charter, operate or otherwise use the vessel for such times and upon such terms as the party of the second part may deem to its best advantage;

(d) Retake the vessel wherever the same may be found and sell the same free from any claim by the party of the first part in law, in equity, in admiralty, or by statute, after first giving a printed notice for ten consecutive days (except Sunday) in some newspaper published in the City of New York, State of New York, and in some newspaper, if any published at the place of sale, which said sale may be held at such place or places and at such time or times as the party [fol. 84] of the second part may specify, and may be conducted without bringing the vessel to the place of sale, and in such manner generally as the party of the second part may deem to its best advantage, and the party of the second part may become the purchaser at any such sale;

(e) Place its duly authorized representative in the business office of the party of the first part to supervise its financial transaction, or have a receiver appointed for like purpose.

Section II. When any right to retake the vessel shall accrue, the party of the second part may retake the same wherever the same may be found without prior demand and without legal process, and for that purpose may enter upon any dock, pier or other premises where the vessel may be, and the party of the second part may take possession of the vessel upon the high seas or in any port, harbor or other place; but without impairing the said right, the party of the first part agrees upon demand to deliver the vessel at its own cost at such place or places as the party of the second part may designate, and that the party of the second part shall have the right to dock the vessel at any dock, pier or other premises of the vessel without charge or to dock the vessel at any other place at the expense of the party of the first part, and further agrees that whenever any legal proceedings shall be commenced to enforce any right under this mortgage, then the party [fol. 85] party of the second part shall be entitled to exercise the right of entry and retaking and also any other rights and powers herein conferred and provided to be exercised by the party of the second part upon the happening of any event of default, and that in any such legal proceedings the party of the second part shall be entitled as a matter of right to the appointment of a receiver or receivers of the vessel and of the earnings, income, revenue, rents, issues or profits thereof, with such power as the court making such appointments shall confer.

Section III. Each and every power or remedy herein specifically given to the party of the second part shall be cumulative and shall be in addition to every other power or remedy herein specifically given, or now or hereafter existing at law, in equity, in admiralty, or by statute, and each and every power or remedy, whether specifically herein given or otherwise so existing may be so exercised from time to time and as often and in such order as may be deemed expedient by the party of the second part, and the exercise or the beginning of the exercise of any power or remedy shall not be deemed a waiver of the right to exercise, at the same time or thereafter, any other power or remedy. No delay or omission by the party of the

second part or by any of the holders of said notes in the exercise of any right or power accruing upon any event of default as above de- [fol. 86] fined, shall impair any such right or power, or shall be construed to be a waiver of any such event of default or an acquiescence therein; nor shall the acceptance by the party of the second part of any security or of any payment of a note or notes maturing after such event of default, or of any payment on account of any past default, be deemed a waiver of any right to take advantage of any further event of default or of any past event of default not completely cured thereby.

Section IV. If at any time after an event of default and prior to the actual sale of the vessel by the party of the second part, the party of the first part shall offer completely to cure all events of default and to pay all expenses, advances and damages of the party of the second part consequent on such default, together with interest at the rate of six per cent per annum, then the party of the second part may, at its discretion, but without any obligation so to do, accept such offer and payment and restore the party of the first part to its former position, and thereupon cancel and annul any notices advancing the maturity of the notes and any notices of sale of the vessel; but no such cancellation or annulment shall affect any subsequent default nor impair any rights consequent thereon.

Section V. The proceeds of any sale and net earnings from any management, charter or other use of the vessel by the party of the second part under any of the powers above specified, and the proceeds [fol. 87] of any judgment collected by the party of the second part for any default hereunder, together with the proceeds of any insurance and of any claims for damages on account of the vessel received by the party of the second part while exercising any of such powers, shall be applied as follows:

First, to the payment of all expenses and charges, including the expenses of any sale, the expenses of any retaking, and any other expenses or advances made or incurred by the party of the second part in the protection of its rights hereunder; and to the payment of any damages sustained by the party of the second part from the default or defaults of the party of the first part, with interest as provided for herein; and to providing adequate indemnity against liens claiming priority over this mortgage.

Second, to the payment pro rata of all of said notes, whether due or not due, with interest to the date of such payment, without preference of one note over another, or of interest over principal.

Third, any surplus thereafter remaining, shall belong and be paid or returned to the party of the first part.

Article III—Possession Until Default

Until default shall have been made in the due and punctual pay- [fol. 88] ment of the interest or of the principal of any note or notes or of some part of such interest or principal, or until some one or

more of the events of default hereinbefore described shall happen, the party of the first part shall be suffered and permitted to retain actual possession of the vessel, and to manage, operate and use the same and to collect, receive, take, use and enjoy the earnings, income, revenue, rents, issues and profits thereof.

In witness whereof, the said party of the first part has caused its corporate name to be hereunto subscribed and its corporate seal to be hereunto affixed and attested by its proper officers, the day and year first above written.

American Star Line, Inc., by Morris Ginsberg. (Corporate Seal.)

Attest: Charles Kanner, Sec'y.

STATE OF NEW YORK,
County of New York, ss:

On the 9th day of August, nineteen hundred and twenty four, before me came Morris Ginsberg, to me known, who, being by me duly sworn, did depose and say that he resides in the Borough of Brooklyn, Kings County; that he is the President of American Star [fol. 89] Line, Inc., the corporation described in, and which executed, the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation; and that he signed his name thereto by like order.

John L. Stoneham, Notary Public. John L. Stoneham, Notary Public, Queens County 521, New York County Clerk's No. 322, Reg. No. 2303. Comm. expires March 30, 1922. (Notarial Seal.)

STATE OF NEW YORK,
County of New York, ss:

I, Charles Kanner, being first duly sworn, say that I am the Secretary of the American Star Line, Inc., the corporation which executed the above mortgage, and that said mortgage is made in good faith and without any design to hinder, delay or defraud any existing or future creditor of the mortgagor or any lienor of the vessel covered by said mortgage.

Chas. Kanner.

[fol. 92] Subscribed and sworn to before me this 9th day of August, 1920. John L. Stoneham, Notary Public. Queens County 521. New York County Clerk No. 322. Reg. No. 2303. Comm. expires March 30, 1923.

(Here follows Morse Exhibit 1-B, marked side folio pages 90 and 91.)

Cat. No. 1266

(Edition July 1, 1919) (This form is for use in making duplicate of Certificate of Registry for Bureau of Navigation)

(INSERT "PERMANENT" OR "TEMPORARY") PERMANENT

REGISTER NO. 172

OFFICIAL NO. 219134 | LETTERS L T K H

THE UNITED STATES OF AMERICA

DEPARTMENT OF COMMERCE

BUREAU OF NAVIGATION

COPY

DUPLICATE

Certificate of Registry

Measured New York, N.Y., 1919

Rebuilt at ....., 19....

Remeasured: ....., 19....

Radio call: K O K C

Service: Freight

Number of crew: 50

In Pursuance of Chapter One, Title XLVIII, "Regulation of Commerce and Navigation," Revised Statutes of the United States.

I S.A. WEBSTER of New York, N.Y., Authorized Agent

having taken and subscribed the oath required by law, and having sworn that

UNITED STATES of AMERICA

(Place for Seal of Department of Commerce)

represented by

UNITED STATES SHIPPING BOARD

is

the only owner

of the vessel called the "WATERBURY", of New York, N.Y.

whereof John E. Curtis is at present master, and is a citizen of the United States, and that

the said vessel was built in the year 1919, at Arlington, N.Y. of steel

as appears by Certificate of Dosney Shipbuilding Corporation, builder, on file in this office

and W. Berryman, A.D. Surveyor,

having certified that the said vessel is a Steamship

two decks, two masts, a plain head, and a round stern; that

her register length is 386.8 feet, her register breadth 52.2 feet, her register depth 27.4 feet,

her height ..... feet; that she measures as follows:

	TONS	100ths
Capacity under tonnage deck	4459	38
Capacity between decks above tonnage deck		
Capacity of inclosures on the upper deck, viz: Forecastle 69.57; bridge 342.06; poop 95.63; break		
houses round 123.09 side, chart 7.93, radio 5.14; excess hatchways 11.90; light and air 59.42	714	74
GROSS TONNAGE	5174	12
Deductions under Section 4153, Revised Statutes, as amended:		
Crew space 176.31; Master's cabin 10.09; B. & W. C. 3.74		
~~Steering gear~~; anchor gear 13.54; Boatswain's stores 17.98		
Chart house 7.93; Donkey engine and boiler; Radiohouse 5.14		
Storage of sails; Propelling power (actual space) XXXX) 677.84 (32%) 1655.71	1892.1344	
I H P 2500 Total Deductions	1890	44
NET TONNAGE	3283	

The following-described spaces, and no others, have been omitted, viz: Forepeak used for water-ballast 31.50, aftpeak used for water-ballast 14.00, open forecastle 7.83, open bridge, open poop, open shelter-deck, anchor gear, steering gear 24.07, donkey engine and boiler, light and air 35.21, wheelhouse 7.07, galley 8.76, condenser, water-closets 14.28, cabins, Refrigerating Machine 9.49

and the said JOHN E. CURTIS having agreed to the description and admeasurement above specified, according to law, said vessel has been duly registered at this Port.

GIVEN under my hand and seal, at the Port of NEW YORK, N.Y. this Twenty-fifth day of July, in the year one thousand nine hundred and NINETEEN.

(Place for Seal of Naval Officer.)

T. D. WILSON, Deputy

(Place for Seal of Collector.)

E. J. DONAHUE, A. Deputy Collector of Customs.

[1] Insert name and address of person by whom oath or affirmation was made.
[2] Substitute "affirmation" when necessary.
[3] Substitute "affirmed" when necessary.
[4] If there is only one owner, write "he" or "she." If more than one owner, write "he (or she) owning" and the part owned, "together with" followed by the names of other owners, their shares and addresses.
[5] Write "wood," "iron," "steel," or as required.
[6] Cite surrendered marine document or write "certificate of ....., builder." If first document of a new vessel, write "said register," "said enrollment," or "said license." In the first document of a new vessel, give the name and title of the inventor.
[7] Name and give tonnage of each compartment in double bottom and of each peak tank used other than for water ballast which is included herein.
[8] Carry total of all inclosures to spaces at end of next line.
[9] To be included in gross only when authorized by the Commissioner of Navigation.
[10] Insert tonnage representing actual machinery space used in ascertaining propelling power.
[11] To be exempted, cabins and stairways for passengers must be on a deck which is not a deck to the hull, all other spaces except forepeak, aftpeak, and other water-ballast spaces must be on or above the upper deck to the hull. Give tonnage of each space.
[12] In the first document of a new vessel, give the name of the person countersigning certificate of measurement.

Commissioner of Navigation.

Eugene Tyler Chamberlain

Morse Exhibit 1-B

90

Port of ....., 19....

having taken the oath required by law, is at present master of the within-named vessel, in lieu of ..... late master.

..... Collector of Customs.

—or's Office, New York

I hereby certify — to be a true copy of the original — in this office given in my hand and the seal of the Collector — this 11th day of August, 1920.

John C. Farrell, Acting Deputy Collector.

Fee $7.00 pd.

PETITIONER'S EXHIBIT 1-C

Exhibit "C"

To all to whom these presents shall come, Greeting:

Know ye, that the United States of America represented by the United States Shipping Board, acting by and through the United States Shipping Board Emergency Fleet Corporation, Assignor, for [fol. 93] and in consideration of the sum of Ten dollars ($10.00) lawful money of the United States of America, and other good and valuable consideration, to it in hand paid before the sealing and delivery of these presents by Harry Luber, Assignee, of New York, New York, the receipt whereof said Assignor does hereby acknowledge, has transferred, assigned, set over and delivered and by these presents does transfer, assign, set over and deliver unto the said Assignee his personal representatives, executors, administrators, successors and assigns, all the right, title and interest of the Assignor in, under and to a certain preferred mortgage dated as of December 30th, 1919, on the SS. Northern Star, Ex-Waterbury, (Official number 219134), executed and delivered by American Star Line, Inc., as Mortgagor, to the Assignor, as Mortgagee, to secure the payment of ten (10) certain promissory notes aggregating the principal amount of One million, two hundred seventeen thousand, four hundred thirty-seven dollars and fifty cents ($1,217,437.50) all of which notes remain unpaid, said mortgage being fully recorded on August 11th, 1920, in the United States Custom House at New York, New York, in Book P. M. No. 1, Page 58.

Together with all the right, title and interest of the Assignor in, under and to the aforesaid unpaid notes and the moneys due and to grow due thereunder with interest.

Together with all the right, title and interest of the Assignor in, under and to the insurance policies and/or cover notes, covering said [fol. 94] steamer effected by the said American Star Line, Inc., or its Receivers, pursuant to the terms and conditions of said mortgage including any money due or which may hereafter become due from the underwriters thereof for losses occurring payable thereunder.

To have and to hold the same unto the said assignee, his personal representatives, executors, administrators, successors and assigns forever, to the sole and only proper use, benefit and behalf of the said Assignee, his personal representatives, executors, administrators, successors and assigns.

The Assignor agrees, for and in consideration of the money paid for the securities assigned, that it will not assert any lien it may now have against the said SS. Northern Star accruing by reason of the Receiver's Certificates it holds of the American Star Line, Inc., or any other lien of any nature whatever.

In testimony whereof, the Assignor has caused this instrument to be executed by its proper officers therein duly authorized this 4th day of August, 1923.

United States of America, by United States Shipping Board Emergency Fleet Corporation, by Sidney Henry, Vice President. (Seal.)

[fol. 95] Attest: Carl P. Kremer, Acting Secretary.

DISTRICT OF COLUMBIA, ss:

I, Carl P. Kremer, a notary public, in and for the District of Columbia, do hereby certify that Sidney Henry, who is Vice President of the United States Shipping Board Emergency Fleet Corporation, which said Fleet Corporation for and on behalf of the United States of America, executed a certain assignment bearing date of the 4th day of August, 1923, hereto annexed, personally appeared before me in said District of Columbia, the said Sidney Henry, being personally well known to me to be the Vice President of said Fleet Corporation, which executed for and on behalf of the United States of America, the said assignment, and acknowledged to me that he executed the same as the Vice President of the said Fleet Corporation; and that the same is the free and voluntary act and deed of said United States of America through the said United States Shipping Board Emergency Fleet Corporation, and of himself as such Vice President for the uses and purposes therein expressed.

Given under my hand and seal this 4th day of August, 1923.

Carl P. Kremer, Notary Public. (Seal.) My commission [fol. 96] expires August 23, 1917.

Approved as to form. Harry Long, Asst. Counsel.

Approved as to substance. C. F. Buck, Director of Finance. R. H. Hallett, Adm. Asst. to General Counsel.

Custom House, New York, N. Y., August 11, 1923. Received for record 9 h. 00 m. A. M. Recorded, Book P. M. 9, page 10. John Farrell, Acting Deputy Collector. Compared by C. J. T.

[fol. 97] MORSE EXHIBIT No. 2

MORSE DRY DOCK & REPAIR COMPANY, 54TH TO 57TH STREETS, BROOKLYN, N. Y.

November 22, 1920.

All contracts are made subject to delay in event of strikes, labor difficulties, acts of government or governmental representatives, fires or causes beyond our control. We shall not be responsible for any loss or damage due to any cause other than the sole negligence of our agents, servants and employees in the course of our work on any vessel while in our exclusive possession and control undergoing repairs.

S. S. "Northern Star"

Messrs. MacFarland & Garmey, 32 Broadway, New York.

Att. Mr. John Garmey

GENTLEMEN: In answer to your request for estimates, we herewith submit the following:

[fol. 98] Item 1—Main throttle valve to be made in good working order. Bottom cover on throttle valve to be repaired.
Item 2—Main air pump to be opened up and air pump bucket drawn.
Item 3—After spring bearing to be refastened.
Item 4—Dynamo to be generally overhauled and one new slipper to be made for same (three sets bearings remetalled, ground shaft lifted and dried in lathe.)
Item 5—Bottom end brasses for blower engine to be remetalled.
Item 6—Valves on main feed pumps to be faced up.
Item 7—Main and auxiliary stop valves to be ground in and made tight.
Item 8—Steam and exhaust valves for back line to be ground in and made tight.
Item 9—Four (4) new pins and one bushing for steering engine to be renewed.
Item 10—Two side lights to be repaired and one resistance to be installed in pilot house.
Item 11—Two connections to be repaired on after bulkheads for cargo lights.
Item 12—Twelve (12) valves for Edward's air pump.
Item 13—Three check valves to be faced up.
Item 14—Exhaust line to be repaired on bilge pump line.
Item 15—Main auxiliary stop valve to be opened up. Instal new seat.

[fol. 99] Deck Department

Item 16—Wheels on windlass friction gear to be renewed.
Item 17—Hand rails on fore deck to be repaired.
Item 18—Leak in forepeak—caulk 12 rivets.
Item 19—One fire hose rack to be repaired on fore deck.
Item 20—Couplings to be fitted to rubber hose.
Item 21—Cargo blocks to be repaired.
Item 22—Couplings on fire hose to be fixed.
Item 23—Locks on firemen's locker.

All of the above for the sum of One thousand forty-five dollars, $1,045.00.

Time required to complete the above work, four (4) working days.

Yours very truly, Morse Dry Dock & Repair Company. C. H. Want, Asst. General Manager.

CHW-R.

[fol. 100] Petitioner's Exhibit A

September 22, 1920.

Captain O. O. Agaard, S/S Northern Star.

Dear Captain Agaard: We are sending you through A. F. Nicholas, mate you recommended to be engaged for the S/S Northern Star, a copy of the mortgage held by the United States Shipping Board on your steamer. This copy is supposed to be kept on board the S/S "Northern Star" at all times together with the ship's papers.

Hoping to see you in person tomorrow, I am,

Yours very truly, —— ——.

SJK/ML.

P. S.—We are also sending you with Mr. Nicholas the mail for the crew as well as your personal mail.

Morse Dry Dock & Repair Co. vs. Northern Star. Petitioner's Exhibit "A" in evidence, Nov. 16, 1923. J. H. Leavens, Deputy Clerk.

[fol. 101] Petitioner's Exhibit B

Official Papers of S. S. Northern Star

(These papers are all locked in box in wardrobe in Captain's room.)
Suez Canal tonnage certificate.
Panama Canal tonnage certificate.
Swedish Canal tonnage certificate.
Assignment of Official Number.

American Bureau Certificates—
of Seaworthiness,
of Freeboard & Freeboard Assignment,
8 Certificates, and
2 Reports on Anchors & Cables and Shackles.
5 Letters from the "Downey Shipbuilding Corporation re compasses, davits, life boats, life rafts, lamps and lanterns, stream & Tow lines.
8 Certificates issued by the Superintendent of "Lloyds" re Examination and Testing of Cables.
1 Envelope Containing Copy of Mortgage on S. S. "Northern Star."
O. O. Agaard, ex Master.

[fol. 102] The above list of official papers have been examined by me and found to be correct.
O. Anderson, Master Now in Charge of the S. S. Northern Star.

Philadelphia, Oct. 31st.

Also all three Chronometers deposited with "Negus" on August 30, 1922 for safe-keeping.

* * * * * * *

Register & Last Light Bill with last Fumigation Certificate are at the Custom House since entering steamer on the 3rd of July.
O. O. Agaard, Master.

(Returned to steamer October 20th. Returned to steamer on clearing.)

[fol. 103] Official Papers of S. S. Northern Star

(These papers are all locked in box in wardrobe in Captain's room.)
Suez Canal tonnage certificate.
Panama Canal tonnage certificate.
Swedish Canal tonnage certificate.
Assignment of Official Number.
American Bureau Certificates—
of Seaworthiness,
of Freeboard & Freeboard Assignment,
8 Certificates, and
2 Reports on Anchors & Cables and Shackles.

5 Letters from the "Downey Shipbuilding Corporation" Re Compasses, Davits, Life Boats, Liferafts, Lamps & Lantern, Stream & Tow Lines.
8 Certificates issued by the Superintendent of "Lloyds" re Examination and Testing of Cables.
1 Envelope Containing Copy of Mortgage on S. S. Northern Star.
O. Anderson, ex Master.

Morse vs. Northern Star. Petitioner's Exhibit "C" in evidence November 16, 1923.

[fol. 104] The above list of official papers have been examined by me and found to be correct.

A. F. Nicholas, Master Now in Charge of S. S. Northern Star.

Phila., Pa., Feb. 6th, 1923.

Also 3 Chronometers in chart room register at the Custom House.

—— ——, Master.

PETITIONER'S EXHIBIT D

A. D. 5579

New York, N. Y., December 30, 1919.

No. 1.
$202,906.25. —— —, 19—.

On or before the 30th day of June, 1920 for value received, the undersigned promises to pay to the United States of America, or order at the office of the United States Shipping Board Washington, [fol. 105] D. C., in gold coin or its equivalent in funds current in New York City, the sum of $202,906.25, together with interest thereon, from the date hereof, in like coin, or such equivalent at the rate of 5% per annum, payable semi-annually.

This note is one of a series of 10 notes totalling $1,217,437.50, of like form and tenor, save for their respective amounts and dates of maturity; and given in payment for the American steel steamer "Waterbury", Official Number 219134. Each of said notes is secured by a first mortgage upon the said vessel, which mortgage is dated December 30, 1919, and this note is issued, negotiated and received by any holder hereof subject to all the terms and conditions of said mortgage, and secured thereby to the same extent as if said mortgage were set out herein in full. If default be made in the prompt and faihtful payment of this or any of said notes or in the performance of any of the covenants and conditions of said mortgage, this note shall immediately become due and payable.

In the event of suit to collect this note, the undersigned agrees to pay reasonable attorneys' fees.

In witness whereof, the undersigned has caused its corporate name to be subscribed and its corporate seal to be affixed hereto on its behalf by its Treasurer or Assistant Treasurer and its President or [fol. 106] Vice President and its Secretary or Assistant Secretary thereunto duly authorized.

American Star Line, Inc., by Chas. Kanner, Treasurer. By Moses Ginsberg, President.

Attest: Chas. Kanner, Secretary. (Seal.)

(Reverse side:) Revenue Stamps $40.60. Without recourse pay to the order of Harry Luber. United States of America, by United States Shipping Board, by United States Shipping Board Emergency Fleet Corporation, by George F. Thomas, Asst. Treas.

[fol. 107] A D 5579

No. 2.
$202,906.25.

New York, N. Y., December 30, 1919.

On or before the 30th day of Dec., 1920 for value received, the undersigned promises to pay to the United States of America, or order at the office of the United States Shipping Board, Washington, D. C., in gold coin or its equivalent in funds current in New York City, the sum of $202,906.25, together with interest thereon, from the date hereof, in like coin, or such equivalent, at the rate of 5% per annum, payable semi-annually.

This note is one of a series of 10 notes totalling $1,217,437.50, of like form and tenor, save for their respective amounts and dates of maturity; and given in payment for the American steel steamer "Waterbury," Official Number 219134. Each of said notes is secured by a first mortgage upon the said vessel, which mortgage is dated December 30, 1919, and this note is issued, negotiated and received by any holder hereof subject to all the terms and conditions of said mortgage, and secured thereby to the same extent as if said mortgage were set out herein in full. If default be made in the prompt and faithful payment of this or any of said notes or in the [fol. 108] performance of any of the covenants and conditions of said mortgage, this note shall immediately become due and payable.

In the event of suit to collect this note, the undersigned agrees to pay reasonable attorneys' fees.

In witness whereof, the undersigned has caused its corporate name to be subscribed and its corporate seal to be affixed hereto on its behalf by its Treasurer or Assistant Treasurer and its President or Vice President and its Secretary or Assistant Secretary thereunto duly authorized.

American Star Line, Inc., by Chas. Kanner, Treasurer. By Moses Ginsberg, President.

Attest: Chas. Kanner, Secretary. (Seal.)

[fol. 109] (Reverse side:) Revenue Stamps $40.60. Without recourse pay to the order of Harry Lubet. United States of America, by United States Shipping Board, by United States Shipping Board Emergency Fleet Corporation, by George F. Thomas, Asst. Treas.

A D 5579

No. 3.
$101,453.12.

New York, N. Y., December 30, 1919.

On or before the 30th day of June, 1920, for value received, the undersigned promises to pay to the United States of America, or order at the office of the United States Shipping Board, Washington, D. C., in gold coin or its equivalent in funds current in New

York City, the sum of $101,453.12, together with interest thereon, from the date hereof, in like coin, or such equivalent at the rate of 5% per annum, payable semi-annually.

This note is one of a series of 10 notes totalling $1,217,437.50, [fol. 110] of like form and tenor, save for their respective amounts and dates of maturity; and given in payment for the American steel steamer "Waterbury," Official Number 219134. Each of said notes is secured by a first mortgage upon the said vessel, which mortgage is dated December 30, 1919, and this note is issued, negotiated and received by any holder thereof subject to all the terms and conditions of said mortgage, and secured thereby to the same extent as if said mortgage were set out herein in full. If default be made in the prompt and faithful payment of this or any of said notes or in the performance of any of the covenants and conditions of said mortgage, this note shall immediately become due and payable.

In the event of suit to collect this note, the undersigned agrees to pay reasonable attorneys' fees.

In witness whereof, the undersigned has caused its corporate name to be subscribed and its corporate seal to be affixed hereto on its behalf by its Treasurer or Assistant Treasurer and its President or Vice President and its Secretary or Assistant Secretary thereunto duly authoized.

American Star Line, Inc., by Chas. Kanner, Treasurer. By Moses Ginsberg, President.

[fol. 111] Attest: Chas. Kanner, Secretary. (Seal.)

(Reverse side:) Revenue Stamps $20.30. Without recourse pay to the order of Harry Luber. United States of America, by United States Shipping Board, by United States Shipping Board Emergency Fleet Corporation, by George F. Thomas, Asst. Treas.

A D 5579

No. 4.
$101,453.13.

New York, N. Y., December 30, 1919.

On or before the 30th day of December, 1921, for value received, the undersigned promises to pay to the United States of America, or [fol. 112] order at the office of the United States Shipping Board, Washington, D. C., in gold coin or its equivalent in funds current in New York City, the sum of $101,453.13, together with interest thereon, from the date hereof, in like coin, or such equivalent, at the rate of 5% per annum, payable semi-annually.

This note is one of a series of 10 notes totalling $1,217,437.50, of like form and tenor, save for their respective amounts and dates of maturity; and given in payment for the American steel steamer "Waterbury," official number 219134. Each of said notes is secured by a first mortgage upon the said vessel, which mortgage is dated December 30, 1919, and this note issued, negotiated and received

by any holder hereof subject to all the terms and conditions of said mortgage, and secured thereby to the same extent as if said mortgage were set out herein in full. If default be made in the prompt and faithful payment of this or any of said notes or in the performance of any of the covenants and conditions of said mortgage, this note shall immediately become due and payable.

In the event of suit to collect this note, the undersigned agrees to pay reasonable attorneys' fees.

In witness whereof, the undersigned has caused its corporate name to be subscribed and its corporate seal to be affixed hereto on its behalf by its Treasurer or Assistant Treasurer and its President or Vice [fol. 113] President and its Secretary or Assistant Secretary thereunto duly authorized.

American Star Line, Inc., by Chas. Kanner, Treasurer. By Moses Ginsberg, President.

Attest: Chas. Kanner, Secretary. (Seal.)

(Reverse side:) Revenue Stamps $20.30. Without recourse pay to the order of Harry Luber. United States of America, by United States Shipping Board, by United States Shipping Board Emergency Fleet Corporation, by George F. Thomas, Asst. Treas.

[fol. 114] A D 5579

No. 5.
$101,453.12.

New York, N. Y., December 30, 1919.

On or before the 30th day of June, 1922 for value received, the undersigned promises to pay to the United States of America, or order at the office of the United States Shipping Board, Washington, D. C., in gold coin or its equivalent in funds current in New York City, the sum of $101,453.12, together with interest thereon, from the date hereof, in like coin, or such equivalent, at the rate of 5% per annum, payable semi-annually.

This note is one of a series of 10 notes totalling $1,217,437.50, of like form and tenor, save for their respective amounts and dates of maturity; and given in payment for the American steel steamer "Waterbury", official number 219134. Each of said notes is secured by a first mortgage upon the said vessel, which mortgage is dated December 30, 1919, and this note is issued, negotiated and received by any holder hereof subject to all the terms and conditions of said mortgage, and secured thereby to the same extent as if said mortgage were set out herein in full. If default be made in the prompt and faithful payment of this or any of said notes or in the performance of any of the covenants and conditions of said mortgage, this note shall immediately become due and payable.

[fol. 115] In the event of suit to collect this note, the undersigned agrees to pay reasonable attorneys' fees.

In witness Whereof, the undersigned has caused its corporate name to be subscribed and its corporate seal to be affixed hereto on

its behalf by its Treasurer or Assistant Treasurer and its President or Vice President and its Secretary or Assistant Secretary thereto duly authorized.

American Star Line, Inc., by Chas. Kanner, Treasurer. By Moses Ginsberg, President.

Attest: Chas. Kanner, Secretary. (Seal.)

(Reverse side:) Revenue Stamps $20.30. To Account of United States Shipping Board Emergency Fleet Corporation. (Sgd.) T. L. [fol. 116] Clear. T. L. Clear, Treas. Without recourse pay to the order of Harry Luber. United States of America, by United States Shipping Board, by United States Shipping Board Emergency Fleet Corporation, by George F. Thomas, Asst. Treas.

A D 5579

No. 6.
$101,453.13.

New York, N. Y., December 30, 1919.

On or before the 30th day of December, 1922 for value received, the undersigned promises to pay to the United States of America, or order at the office of the United States Shipping Board, Washington, D. C., in gold coin or its equivalent in funds current in New York City, the sum of $101,453.13, together with interest thereon, from the date hereof, in like coin, or such equivalent, at the rate of 5% per annum, payable semi-annually.

This note is one of a series of 10 notes totalling $1,217,437.50, of [fol. 117] like form and tenor, save for their respective amounts and dates of maturity; and given in payment for the American steel steamer "Waterbury", official number 219134. Each of said notes is secured by a first mortgage upon the said vessel, which mortgage is dated December 30, 1919, and this note is issued, negotiated and received by any holder hereof subject to all the terms and conditions of said mortgage, and secured thereby to the same extent as if said mortgage were set out herein in full. If default be made in the prompt and faithful payment of this or any of said notes or in the performance of any of the covenants and conditions of said mortgage, this note shall immediately become due and payable.

In the event of suit to collect this note, the undersigned agrees to pay reasonable attorneys' fees.

In Witness Whereof, the undersigned has caused its corporate name to be subscribed and its corporate seal to be affixed hereto on its behalf by its Treasurer or Assistant Treasurer and its President or Vice President and its Secretary or Assistant Secretary thereunto duly authorized.

American Star Line, Inc., by Chas. Kanner, Treasurer. By Moses Ginsberg, President.

[fol. 118] Attest: Chas. Kanner, Secretary. (Seal.)

(Reverse side:) Revenue Stamps $20.30. Without recourse pay to the order of Harry Luber. United States of America, by United

States Shipping Board, by United States Shipping Board Emergency Fleet Corporation, by George F. Thomas, Asst. Treas.

A D 5579

No. 7.
$101,453.12.

New York, N. Y., December 30, 1919.

On or before the 30th day of June, 1923 for value received, the undersigned promises to pay to the United States of America, or order at the office of the United States Shipping Board, Washing-
[fol. 119] ton, D. C., in gold coin or its equivalent in funds current in New York City, the sum of $101,453.12, together with interest thereon, from the date hereof, in like coin, or such equivalent, at the rate of 5% per annum, payable semi-annually.

This note is one of a series of 10 notes totalling $1,217,437.50, of like form and tenor, save for their respective amounts and dates of maturity; and given in payment for the American steel steamer "Waterbury," official number 219134. Each of said notes is secured by a first mortgage upon the said vessel, which mortgage is dated December 30, 1919, and this note is issued, negotiated and received by any holder hereof subject to all the terms and conditions of said mortgage, and secured thereby to the same extent as if said mortgage were set out herein in full. If default be made in the prompt and faithful payment of this or any of said notes or in the performance of any of the covenants and conditions of said mortgage, this note shall immediately become due and payable.

In the event of suit to collect this note, the undersigned agrees to pay reasonable attorney's fees.

In Witness Whereof, the undersigned has caused its corporate name to be subscribed and its corporate seal to be affixed hereto on its behalf by its Treasurer or Assistant Treasurer and it Presi-
[fol. 120] dent or Vice President and its Secretary or Assistant Secretary thereunto duly authorized.

American Star Line, Inc., by Chas. Kanner, Treasurer.
By Moses Ginsberg, President.

Attest: Chas. Kanner, Secretary. (Seal.)

(Reverse side:) Revenue Stamps $20.30. Without recourse pay to the order of Hary Luber. United States of America, by United States Shipping Board, by United States Shipping Board Emergency Fleet Corporation, by George F. Thomas, Asst. Treas.

[fol. 121] A D 5579

No. 8.
$101,453.13.

New York, N. Y., December 30, 1919.

On or before the 30th day of December, 1923, for value received, the undersigned promises to pay to the United States of America,

or order at the office of the United States Shipping Board, Washington, D. C., in gold coin or its equivalent in funds current in New York City the sum of One hundred and one thousand, four hundred and fifty-three dollars and thirteen cents, and to pay interest thereon from the date hereof in like coin or such equivalent at the rate of 5% per annum, payable semi-annually.

This note is one of a series of 10 notes totalling $1,217,437.50, of like form and tenor, save for their respective amounts and dates of maturity; and given in payment for the American steel steamer "Waterbury," official number 219134. Each of said notes is secured by a first mortgage upon the said vessel, which mortgage is dated December 30, 1919, and this note is issued, negotiated and received by any holder hereof subject to all the terms and conditions of said mortgage, and secured thereby to the same extent as if said mortgage were set out herein in full. If default be made in [fol. 122] the prompt and faithful payment of this or any of said notes or in the performance of any of the covenants and conditions of said mortgage, this note shall immediately become due and payable.

In the event of suit to collect this note, the undersigned agrees to pay reasonable attorney's fees.

In witness Whereof, the undersigned has caused its corporate name to be subscribed and its corporate seal to be affixed hereto on its behalf by its Treasurer or Assistant Treasurer and its President or Vice President and its Secretary or Assistant Secretary thereunto duly authorized.

American Star Line, Inc., by Chas. Kanner, Treasurer.
By Moses Ginsberg, President.

Attest: Chas. Kanner, Secretary. (Seal.)

(Reverse side:) Revenue Stamps $20.30. Without recourse pay [fol. 123] to the order of Harry Luber. United States of Amercia, by United States Shipping Board, by United States Shipping Board Emergency Fleet Corporation, by George F. Thomas, Asst. Treas.

AD 5579

No. 9.
$101,453.12.

New York, N. Y., December 30, 1919.

On or before the 30th day of June, 1924 for value received, the undersigned promises to pay to the United States of America, or order at the office of the United States Shipping Board Washington, D. C., in gold coin or its equivalent in funds current in New York City, the sum of $101,453.12, together with interest thereon, from the date hereof, in like coin, or such equivalent, at the rate of 5% per annum, payable semi-annually.

This note is one of a series of 10 notes totalling $1,217,437.50, [fol. 124] of like form and tenor, save for their respective amounts and dates of maturity; and given in payment for the American steel steamer "Waterbury," official number 219134. Each of said

notes is secured by a first mortgage upon the said vessel, which mortgage is dated December 30, 1919, and this note is issued, negotiated and received by any holder hereof subject to all the terms and conditions of said mortgage, and secured thereby to the same extent as if said mortgage were set out herein in full. If default be made in the prompt and faithful payment of this or any of said notes or in the performance of any of the covenants and conditions of said mortgage, this note shall immediately become due and payable.

In the event of suit to collect this note, the undersigned agrees to pay reasonable attorneys' fees.

In Witness Whereof, the undersigned has caused its corporate name to be subscribed and its corporate seal to be affixed hereto on its behalf by its Treasurer or Assistant Treasurer and its President or Vice President and its Secretary or Assistant Secretary thereunto duly authorized.

American Star Line, Inc., by Chas. Kanner, Treasurer.
By Moses Ginsberg, President.

[fol. 125] Attest: Chas. Kanner, Secretary. (Seal.)

(Reverse side:) Revenue Stamps $20.30. Without recourse pay to the order of Harry Luber. United States of America, by United States Shipping Board, by United States Shipping Board Emergency Fleet Corporation, by George F. Thomas, Asst. Treas.

AD 5579

No. 10.
$101,453.13.

New York, N. Y., December 30, 1919.

On or before the 30th day of December, 1924, for value received, the undersigned promises to pay to the United States of America, or order at the office of the United States Shipping Board, Washington, [fol. 126] D. C., in gold coin or its equivalent in funds current in New York City the sum of $101,453.13, together with interest thereon, from the date hereof in like coin, or such equivalent, at the rate of 5% per annum, payable semi-annually.

This note is one of a series of 10 notes totalling $1,217,437.50, of like form and tenor, save for their respective amounts and dates of maturity; and given in payment for the American steel steamer "Waterbury," official number 219134. Each of said notes is secured by a first mortgage upon the said vessel, which mortgage is dated December 30, 1919, and this note is issued, negotiated and received by any holder hereof subject to all the terms and conditions of said mortgage, and secured thereby to the same extent as if said mortgage were set out herein in full. If default be made in the prompt and faithful payment of this or any of said notes or in the performance of any of the covenants and conditions of said mortgage, this note shall immediately become due and payable.

In the event of suit to collect this note, the undersigned agrees to pay reasonable attorneys' fees.

In Witness Whereof, the undersigned has caused its corporate name to be subscribed and its corporate seal to be affixed hereto on its behalf by its Treasurer or Assistant Treasurer and its President or [fol. 127] Vice President and its Secretary or Assistant Secretary thereunto duly authorized.

American Star Line, Inc., by Chas. Kanner, Treasurer. By Moses Ginsberg, President.

Attest: Chas. Kanner, Secretary. (Seal.)

(Reverse side:) Revenue Stamps $20.30. Without recourse pay to the order of Harry Luber. United States of America, by United States Shipping Board, by United States Shipping Board Emergency Fleet Corporation, by George F. Thomas, Asst. Treas.

Morse Dry Dock Co. v. Northern Star. Petitioner's Exhibit "D" in evidence. 9 notes, No. 2 to 10, inclusive, Nov. 16, 1923. J. H. Leavens, Deputy Clerk.

[fol. 128] IN UNITED STATES DISTRICT COURT

[Title omitted]

OPINION

Barber & Stetson, proctors for libellant.
Gerson C. Young, proctor for intervening petitioner.

CAMPBELL, J.:

This is a suit in admiralty.

The libellant seeks to recover against the steamship Northern Star and filed a libel for the sum of $1,801.87 for work, labor and services alleged to have been performed and supplies alleged to have been furnished in making repairs to the steamship Northern Star, between the 14th day of November, 1920, and the 27th day of November, 1920, at the special instance and request of the American Star Line, Inc., alleged to have been in possession of said steamship at that time.

[fol. 129] Harry Luber, intervening petitioner, answered denying any knowledge, information or belief as to the performance of the services and the furnishing of the supplies and the reasonableness of the charges therefor alleged in the libel, and alleging that he was the owner and holder of a preferred mortgage which was a prior lien to any claim of the libellant, and further that by the terms of the said mortgage the creation of any maritime liens upon the said steamship, or any liens which would rank prior to the lien of the said mortgage, was prohibited, and that the libellant could not have any lien on said vessel for the repairs, supplies and services alleged in the libel.

The amendments of the libel and answer set forth in the stipulation of the proctors for libellant and the intervening petitioner are allowed.

Between November 14, 1920 and November 27, 1920 the libellant, at the special instance and request of Mr. Garmey, consulting engineer, who was retained by the American Star Line, Inc., then the owner of the steamship Northern Star performed certain work, labor and services and furnished certain supplies in making repairs to said steamship Northern Star, which were of the fair and reasonable value of $1705.87, no part of which has been paid.

The American Star Line, Inc. was a New York corporation and New York was the home port of the Northern Star.

On August 9th, 1920, the American Star Line, Inc. the owner of the Northern Star executed and delivered to the United States of [fol. 130] America a purchase money mortgage to secure the payment of the sum of $1,217,437.50, with interest, covering the said steamship Northern Star, the said indebtedness being evidenced by ten promissory notes totaling that sum. This mortgage on its face showed that it was intended to be a preferred mortgage.

On August 11, 1920, the bill of sale from the United States of America to the American Star Line, Inc. of the said steamship Northern Star was duly recorded in the office of the Collector of Customs of the Port of New York, and on the same day the said mortgage for $1,217,437.50, made by the said American Star Line, Inc., covering said steamship Northern Star, was duly recorded in the office of the Collector of Customs of the Port of New York.

The steamship, Northern Star was at the time of the recording of the bill of sale and purchase money mortgage on the high seas having left Norfolk, Virginia, on August 3, 1920, for Stockholm, where she arrived on August 23, 1920. On September 3, 1920, the said steamship left Stockholm for New York, where she arrived on September 21, 1920.

On the arrival of the steamship at the port of New York, arrangements were made to put a certified copy of the mortgage aboard the ship, but they having miscarried, the new first officer left for Norfolk, Virginia, where he arrived on September 23, 1920, and delivered the certified copy of the mortgage to the captain of the ship, who placed it with the ship's papers and documents, with which it [fol. 131] remained at all times until the sale by the Marshal.

On September 22, 1920, the said steamship cleared at the port of New York, but the Collector of Customs at that port failed to make the endorsement of the mortgage on the ship's papers.

On June 27, 1921, the Collector of the Port of New York made the endorsement of the preferred mortgage on the ship's papers.

No reason was shown why the Collector failed to perform his duty and make the endorsement of the mortgage on the ship's papers in September, 1920, the first time the said steamship came to the port of New York and cleared after the mortgage was recorded.

On August 4, 1923, the said mortgage was for a valuable consideration duly assigned by the United States of America to Harry

Luber, the intervening petitioner, and on August 11, 1923, the said assignment was duly recorded in the office of the Collector of the port of New York.

The said steamship Northern Star was arrested by process of this court by libel filed by W. S. Pendleton, Jr. & Company and Joseph A. Rubin, and subsequently sold under a decree in that suit. Before the sale of the said vessel in that suit the libellant herein filed a libel against the said steamship, and the said Harry Luber as the purchaser of said mortgage intervened in this suit.

The American Star Line, Inc. was a New York corporation with an office in New York City, at the time the repairs alleged in the [fol. 132] libel in the instant suit were made, the mortgage was recorded in the Collector's office at the port of New York, a certified copy was on board the ship, and Mr. Garmey knew of the existence of the said mortgage.

The law in force at the time of the making of repairs by the libellant to said steamship Northern Star providing for maritime liens for necessaries is found in subsections P. Q. and R. of Section 30, Ship Mortgage Act 1920, 41 Stat. L. 1005, which reads as follows:

"Subsection P. Any person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit in rem, and it shall not be necessary to allege or prove that credit was given to the vessel.

Subsection Q. The following persons shall be presumed to have authority from the owner to procure repairs, supplies, towage, use of dry dock or marine railway, and other necessaries for the vessel: The managing owner, ship's husband, master, or any person to whom the management of the vessel at the port of supply is intrusted. No person tortiously or unlawfully in possession or charge of a vessel shall have authority to bind the vessel.

[fol. 133] Subsection R. The officers and agents of a vessel specified in subsection Q shall be taken to include such officers and agents when appointed by a charterer, by an owner pro hac vice, or by an agreed purchaser in possession of the vessel; but nothing in this section shall be construed to confer a lien when the furnisher knew, or by exercise of reasonable diligence could have ascertained, that because of the terms of the charter party, agreement for sale of the vessel, or for any other reason, the person ordering the repairs, supplies or other necessaries was without authority to bind the vessel therefor."

Under the law, as quoted, I am of the opinion that Mr. Garmey had no authority to bind the vessel, nor did the American Star Line, Inc., through whom his authority, if he had any, must have come, have any authority itself to bind the vessel because of the prohibition contained in said mortgage, even if the said mortgage were not a preferred mortgage.

Section VI, Article I, of the mortgage in question provides as follows:

"Section VI. To carry a properly certified copy of this mortgage with the ship's papers; and to take such other appropriate steps, as designated to it by the party of the second part from time to time or required by the circumstances, as will give notice to the world [fol. 134] that the party of the first part's right, title and interest in the vessel is subject to this mortgage, and that the party of the first part has no right, power nor authority to suffer or permit to be imposed on or against the vessel, any liens or claims which might be deemed superior to or a charge against, the interest of the party of the second part in the vessel."

Under the law as hereinbefore quoted the libellant could not acquire a lien if it knew or by exercise of reasonable diligence could have ascertained that "for any other reason" the person ordering the repairs, etc. was without authority to bind the vessel therefor.

The libellant claims that this does not apply to the owner but I cannot agree with that claim because the use of the words "for any other reason" after the words "a charter party, agreement for the sale of the vessel" show that they are to be construed broadly, and much stronger reasons exist to limit the power of a corporation to bind a vessel and create maritime liens thereon where it has purchased the same and given a large purchase money mortgage, than in the case where there has been an agreement to sell a vessel which sale is not yet consummated.

It would also seem to me that much less was required of libellant in this case where also the information could be acquired from public [fol. 135] records than is required in case of a charter party which is not so recorded.

The terms of subsection R. seems to me to clearly show the intention to include the owner of the vessel among those who by their own agreements may be prohibited from binding the vessel because it says "Nothing in this section shall be construed to confer a lien", which shows plainly that the prohibition referred to is not limited to any class named therein, or in any particular subsection, but it is to be construed in connection with the whole of Section 30, including of course subsection P and Q. This also further appears to be the true construction because when it was intended to refer only to a particular subsection, it was done as appears early in subsection R, where the word "section" was not used but it says "specified in subsection Q."

This construction is also strengthened by the fact that subsection R specifies "the terms of * * * agreement for sale of the vessel" as a source from which it may be learned that there is no authority to bind the vessel, because the terms of agreement for the sale of the vessel would bind the seller as well as the purchase-, and if the owner who was making the sale remained in possession, he would be the one who would by the terms of the agreement be deprived of authority to bind the vessel.

Holding therefore as I do that by their terms of said mortgage the American Star Line, Inc. was prohibited from creating a maritime

[fol. 136] lien for the repairs made by the libellant, and that such probihition comes under the term "for any other reason" as set forth in said subsection R, there can be no doubt that had libellant exercised reasonable diligence, it could have ascertained the fact, because inquiry at the office of the American Star Line, Inc., the records of the Collector's Office in the Custom House, both in New York City, of Mr. Garmey, or of the captain or officer in charge of the ship, would have furnished libellant with complete information.

No evidence was offered to show that any inquiry was made and no one connected with the libellant whose duty it was to make such inquiry was produced, and therefore I find that no such inquiry was made, and under the terms of the statute the libellant did not acquire a maritime lien on said vessel for the making of such repairs.

United Sates v. Carver, 1923 A. M. C. 47;
The Buckhannon, 1923 A. M. C. 645;
The Admiral Goodrich, 288 Fed. 362;
The Ascutney, 289 Fed. 802;
The Awensdaw, 1923, A. M. C. 505;
The Northern No. 44, 1923 A. M. C. 622.

Libellant claims that the said mortgage held by Harry Luber was not a preferred mortgage at the time that libellant made the repairs to said steamship because it was not endorsed on the ship's papers.

[fol. 137] So much of the law in force at the time libellant made such repairs to said steamship as is necessary for consideration in the instant case reads as follows:

Section 30, Ship Mortgage Act 1920, 41 Stat. L. 1,000:

"Subsection C. (a) No sale, conveyance, or mortgage which, at the time such sale, conveyance, or mortgage is made, include a vessel of the United States or any portion thereof, as the whole or any part of the vessel sold, conveyed, or mortgaged shall be valid, in respect to such vessel, against any persons other than the grantor or mortgagor, his heir or devisee, and a person having actual notice thereof, until such bill of sale, conveyance, or mortgage is recorded in the office of the collector of customs of the port of documentation of such vessel, as provided in subdivision (b) of this subsection."

"Subsection D. (a) A valid mortgage which, at the time it is made includes the whole of any vessel of the United States of 200 gross tons and upwards, shall in addition have, in respect to such vessel and as of the date of the compliance with all the provisions of this subdivision, the preferred status given by the provisions of subsection M, if—

(b) Any mortgage which complies in respect to any vessel with [fol. 138] the conditions enumerated in this subsection is hereafter in this section called a "preferred mortgage" as to such vessel.

(c) There shall be endorsed upon the documents of a vessel covered by a preferred mortgage—

(d) Such endorsement shall be made (1) by the collector of customs of the port of documentation of the mortgaged vessel, or (2)

by the collect or of customs of any port in which the vessel is found, if such collector is directed to make the endorsement by the collector of customs of the port of documentation; and no clearance shall be issued to the vessel until such endorsement is made. The collector of customs of the port of documentation shall give such direction by wire or letter at the request of the mortgagee and upon the tender of the cost of communication of such direction. Whenever any new document is issued for the vessel such endorsement shall be transferred to and endorsed upon the new document by the collector of customs."

Subsection E. The collector of customs upon the recording of a preferred mortgage shall deliver two certified copies thereof to the mortgagor who shall place, and use due diligence to retain, one copy on board the mortgaged vessel and cause such copy and the documents of the vessel to be exhibited by the master to any person having [fol. 139] business with the vessel, which may give rise to a maritime lien upon the vessel or to the sale, conveyance, or mortgage thereof. The master of the vessel shall, upon the request of any such person, exhibit to him the documents of the vessel and the copy of any preferred mortgage of the vessel placed on board thereof.

The duty of endorsing the fact of the existence of the mortgage on the ship's papers is placed upon the Collector and not upon the mortgagor or mortgagee and must be done by the Collector of the home port of the vessel but if at that time she is in any other port of the United States, the endorsement may be made by the Collector of that port upon direction of the Collector of the vessel's home port, but that provision has no application in the instant case because the vessel at the time of the recording of the mortgage was on the high seas and no endorsement could have been made until her return to the United States.

The first port at which the said vessel was cleared after the recording of the mortgage was the port of New York, its home port, and it was the duty of the Collector to have made such endorsement when said vessel cleared on September 22, 1920.

The endorsement on the ship's papers could not be made by the mortgagee, and therefore if the failure of the Collector to make such endorsement be held to deprive the mortgage of its status as a pre- [fol. 140] ferred mortgage the whole purpose of Congress would fail.

That Congress realized that this situation might arise appears as the reading of the Act continues, and in construing any part of Section 30 it is necessary to construe it as a whole and therefore it did not intend to penalize the mortgagee for any failure of the Collector to perform his duty, but place- the penalty on him, (see subsection J) (c):

"If any person enters into any contract secured by, or upon the credit of, a vessel of the United States covered by a preferred mortgage, and suffers pecuniary loss * * *."

What did the libellant lose by the failure of the Collector to make the endorsement?

The mortgage was recorded in the same city where the libellant had its place of business, a certified copy was on the ship, and surely more information could be gained from an examination of the copy than from any endorsement on the ship's papers.

Bark Moshulu, 1923 A. M. C. 1091.

If the libellant suffered any loss he could recover the same from the Collector of the Port (Subsection J) (c) supra.

I therefore am of the opinion that the provision for endorsing the fact of the mortgage on the ship's papers is directory, not mandatory, and the mortgage in question had a preferred status from the [fol. 141] date it was recorded, August 11, 1920.

The Nanking, 1923 A. M. C. 1191.

In any event the mortgage would be a preferred mortgage from the date of the endorsement, June 27, 1922 and would be a maritime lien, because even given its strictest construction the Act does not require endorsement on the recording of the mortgage, as it was not only possible but to be expected that mortgage would be given while ships were on the high seas, as in the instant case, or in foreign ports, and no endorsement could be made on the papers at the time because there were no persons at those places who under the law could make such endorsement.

The intervening petitioner is the owner and holder of the mortgage for $1,217,437.50 with interest, default has been made in the payment thereof, and the debt secured by it and the notes are still unpaid.

The petitioning creditor is therefore entitled to recover against the vessel or the proceeds of sale and the libel therein should be dismissed.

A decree may be entered accordingly with costs to the intervening petitioner.

[fol. 142] IN UNITED STATES DISTRICT COURT

[Title omitted]

FINAL DECREE

The above entitled cause having duly come on to be heard before this Court on the pleadings and proofs adduced by the respective parties, and having been duly argued by their respective advocates, and due deliberation having been had thereon, and the Court having filed its opinion in writing, dismissing the libel of Morse Dry Dock & [fol. 143] Repair Company with costs and holding that the mortgage dated August 9, 1920, and recorded August 11, 1920 on the steamship Northern Star, made by the American Star Line, Inc. to the United States of America and by the latter assigned to, and now held by, Harry Luber, intervening petitioner and libelant herein, was and is a preferred mortgage from August 11, 1920 and awarding to said Harry Luber a recovery thereon in the sum of $1,217,437.50

with interest and costs, against the steamship Northern Star, her boilers, engines, etc., and on the proceeds of the sale thereof, and the costs of the intervening petitioner and libelant herein having been duly taxed in the sum of $71.57, it is now, on motion of Gurnee C. Young, proctor for said Harry Lubet,

Ordered, Adjudged and Decreed that the libel herein of Morse Dry Dock & Repair Company be and the same hereby is dismissed on the merits; and it is hereby further

Ordered, Adjudged and Decreed that Harry Lubet, intervening petitioner and libelant herein, have, receive and recover of and from the Morse Dry Dock & Repair Company, its stipulators for costs the sum of $71.57, costs as taxed; and it is hereby further

Ordered, Adjudged and Decreed that the mortgage dated August 9, 1920 on the steamship Northern Star made by the American Star [fol. 144] Line, Inc. mortgagor to the United States of America mortgagee, and assigned to and now held by Harry Lubet, assignee, was and is a preferred mortgage from August 11, 1920, and constitutes a lien upon the said steamship, her boilers, engines, etc. and on the proceeds of the sale thereof; and it is hereby further

Ordered, Adjudged and Decreed that said Harry Lubet, intervening petitioner and libelant herein recover against the steamship Northern Star, her boilers, engines, etc., and against the proceeds of the sale thereof the sum of $1,217,437.50 with interest thereon amounting to the sum of $252,617.18 and amounting in all to the sum of $1,470,054.68 principal and interest; and it is hereby further

Ordered that unless this decree be satisfied or an appeal taken therefrom within ten days after the service of a copy thereof with written notice of the entry thereof upon the proctors for the libelant Morse Dry Dock & Repair Company, the stipulators for costs on behalf of the libelant, Morse Dry Dock & Repair Company show cause within four days or on the first day of jurisdiction thereafter, why execution should not issue against their goods, chattels and lands to satisfy the decree of the court in favor of said Harry Lubet, intervening petitioner and libelant herein.

Marcus B. Campbell, U. S. D. J.

[fol. 145] In United States District Court

[Title omitted]

Notice of Appeal

Sir: Take Notice that the libelant above-named hereby appeals to the United States Circuit Court of Appeals for the Second Circuit from the final decree entered herein February 6, 1924, and from each and every part of said decree.

Dated New York, June 24, 1924.

Yours, &c., Bisbee & Stetson, Proctors for the Libelant and Appellant.

[fol. 146] To Gerson C. Young, Esq., Proctor for Harry Luber, Intervening Petitioner and Libelant and Appellee.

To Percy G. B. Gilkes, Clerk of the District Court of the United States for the Eastern District of New York.

[fol. 147] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENTS OF ERROR

The Morse Dry Dock & Repair Company, libelant-appellant, herein assigns error in the decision and final decree of the District Court in the above entitled cause as follows:

1. Because the Court found that the owner of the steamship "Northern Star" could not create a maritime lien thereon for necessary repairs ordered from the libelant and furnished by it to said steamship.

2. Because the Court failed to find that the libelant acquired a maritime lien on the steamship "Northern Star" for necessary repairs furnished thereto on orders of the owner thereof and failed to find [fol. 148] that the libelant was entitled to a decree for the amount of such maritime lien.

3. Because having found that the owner in possession of the steamship "Northern Star" ordered necessary repairs therefor, the Court found that the furnishing of said necessary repairs did not create a maritime lien on said steamship because said owner agreed in writing when purchasing said steamship, not to suffer or permit any lien thereon.

4. Because the Court found that the provision of Section 30 of the Merchant Marine Act of 1920 for endorsing the fact of the mortgage on the S. S. Northern Star on the ship's papers was directory and not mandatory and that the said mortgage had a preferred status from the date it was recorded, August 11, 1920.

5. Because the Court failed to find that the libelant had a preferred maritime lien on said steamship "Northern Star" prior in rank to that of the alleged preferred mortgage within the meaning of subsection M of Section 30 of the Merchant Marine Act of 1920 for necessary repairs furnished said vessel on order of the owner, the American Star Line, Inc., in possession thereof.

6. Because the Court found that sub-section R of Section 30 of the Merchant Marine Act of 1920 included the owner of a vessel [fol. 149] among those who by their own agreements may be prohibited from binding the vessel.

7. Because the Court erroneously found that Harry Luber, the petitioning creditor (the assignee of the alleged preferred mortgage) was entitled to recover against the vessel on the proceeds of sale as owner and holder of the mortgage in the sum of One million, two hundred seventeen thousand, four hundred thirty-seven and 50/100 Dollars ($1,217,437.50) with interest, Sub-section K of Section 30 of the Merchant Marine Act of 1920 providing to the contrary that such lien may be enforced only by the mortgagee by a suit in rem in admiralty.

8. Because the Court dismissed the libel.

Dated New York, N. Y., July 17th, 1924.

Barber & Stetson, Proctors for Libelant-Appellant.

Office & P. O. Address: 32 Broadway, Borough of Manhattan, New York City.

[fol. 150] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION RE TRANSCRIPT OF RECORD

It is hereby stipulated and agreed, that the foregoing is a true copy of the transcript of the record of the District Court herein as agreed upon by the parties.

Dated New York, N. Y., August 22, 1924.

Barber & Stetson, Proctors for Libelant-Appellant. Gerson C. Young, Proctor for Intervenor-Appellee.

[fol. 151] IN UNITED STATES DISTRICT COURT

[Title omitted]

CLERK'S CERTIFICATE

I, Percy G. B. Gilkes, Clerk of the District Court of the United States of America for the Eastern District of New York, do hereby Certify that the foregoing is a correct copy of the transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of Brooklyn, in the Eastern District of New York, this 22nd day of August, in the year of our Lord one thousand nine hundred and twenty-four and of the Independence of the said United States, the one hundred and forty-ninth.

Percy G. B. Gilkes, Clerk. (Seal.)

[fol. 152] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MORSE DRY DOCK & REPAIR COMPANY, Libellant-Appellant

against

S. S. "NORTHERN STAR," Her Engines etc.; HARRRY LUBER, Intervening Petitioner-Appellee

NOTICE OF MOTION TO TAKE NEW EVIDENCE

SIRS: Please take notice that on Monday, September 8, 1924, at 10.30 o'clock A. M., or so soon thereafter as counsel can be heard, I shall apply to the Honorable Martin T. Manton, a Judge of this Court, at his chambers in the Post Office Building, Borough of Manhattan, City of New York, for an order permitting the interposing of a further defense on behalf of the intervening petitioner-appellee herein and permitting the taking of new evidence in support of the said further defense, and further that I shall then and there ask the Court for such other or further relief as may be just in the premises.

New York City, September 2, 1924.

Yours, etc., Gerson C. Young, Office & Post Office Address 80 Maiden Lane, New York City, Proctor for Harry Luber, Intervening Petitioner-Appellee.

[fol. 153] To Messrs. Barber & Stetson, Office & Post Office Address 32 Broadway, New York City, Proctors for Libellant-Appellant; William Parkin, Esq., Clerk.

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

AFFIDAVIT OF MICHAEL N. SLOTNICK IN SUPPORT OF MOTION

STATE OF NEW YORK,
County of New York, ss:

Michael N. Slotnick, being duly sworn, says:

I am an attorney at law associated with Gerson C. Young, proctor for Harry Luber, the intervening petitioner-appellee herein, and am familiar with the proceedings heretofore had herein.

This is a suit brought by the Morse Dry Dock & Repair Company to recover a repair bill against the S. S. "Northern Star." An intervening petition was filed therein by Harry Luber, the purchaser [fol. 154] from the United States Shipping Board, of a mortgage held by the United States of America upon the S. S. "Northern

Star." The intervening petition alleged amongst other things that by reason of the terms of the aforesaid mortgage on the S. S. "Northern Star," the creation of any maritime liens upon that vessel, which would rank prior to the lien of the mortgagee, was prohibited, and that the libellant cannot have any lien on said vessel. In an opinion rendered after trial, Judge Marcus B. Campbell of the District Court for the Eastern District of New York held that by the terms of the mortgage, the American Star Line, Inc., was prohibited from creating any liens upon the vessel and that the intervening petitioner was the purchaser for value of a mortgage which had preferred status from August 11, 1920. Accordingly a final decree was entered on February 6, 1924, dismissing the libel and entitling the intervening petitioner to recover the balance due under the mortgage. The libellant appealed from this decree.

On or about April 7, 1924, approximately two months after the final decree was entered herein, the proctor for the intervening petitioner learned for the first time that the United States of America and the American Star Line, Inc., had executed an agreement of sale, dated December 24, 1919, which contained amongst others the following provision:

"c. That the buyer will not suffer or permit to be continued any lien, encumbrance or charge which has or might have priority over the mortgage of said vessel to the seller."

The said agreement contains other language confirming the in-
[fol. 155] tention of the parties to it that no lien shall be imposed upon the S. S. "Northern Star."

Owing to the fact that the American Star Line, Inc. has been in receivership for nearly four years, the intervening petitioner was not in a position to acquire information concerning the aforesaid agreement of which he was apprised by chance through a conference with an assistant United States attorney concerning similar litigation involving the S. S. "American Star," which is pending in the District Court for New Jersey.

The intervening petitioner wishes to add allegations to his intervening petition and his answer to the libel herein, pleading the aforesaid agreement of sale as a further bar to the creation of any lien on behalf of the libellant herein upon the S. S. "Northern Star."

The intervening petitioner also wishes to introduce new evidence in proof of the aforesaid agreement of sale.

Wherefore, your deponent prays that an order be entered herein
nting Harry Luber, the intervening petitioner herein, leave to
mend his pleadings so as to set up a further defense of the aforesaid agreement of sale and granting him leave to take new evidence in proof of the said further defenses and said agreement, and that he be given such other or further relief as may be just in the premises.

Michael N. Slotnick.

Sworn to before me this 2nd day of September, 1924. David Kugel, Notary Public, N. Y. County, #410. Commission expires March 30, 1926.

[fol. 156] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER GRANTING MOTION TO TAKE NEW EVIDENCE—Sept. 29, 1924

A motion having duly come on to be heard before this Court at a stated term thereof, for an order permitting the interposing of a further defense on behalf of the intervening petitioner-appellee herein and permitting the taking of new evidence in support of the said further defense, and the said motion having been duly argued by the advocates for the respective parties, and due deliberation having been had thereon, and a decision having been rendered on the 25th day of September, 1924, granting said motion, now on motion of Gerson C. Young, proctor for the intervening petitioner-appellee, it is

Ordered that the said motion be, and it hereby is granted, and it is further

[fol.157] Ordered, pursuant to Admiralty Rules VI and VII that the intervening petitioner-appellee be, and he hereby is, given leave to file in this Court, within ten days after the entry of this order, an amended intervening petition and an amended answer to the libel pleading an agreement dated December 24, 1919, between the United States of America and the American Star Line, and interposing further defenses based on said agreement, and that the libellant-appellant answer the said amended intervening petition within twenty days, and it is further

Ordered pursuant to Admiralty Rules VII and VIII of this Court, that new evidence concerning said agreement and further defenses be taken herein and be filed in this Court the intervening petitioner's new evidence to be taken within thirty days after the entry of this order, and the libellant's new evidence, if any, to be taken within twenty days after the filing of the intervening petitioner's new evidence, and it is further

Ordered pursuant to Admiralty Rule IX of this Court that the aforesaid amended pleadings and new evidence shall thereafter be printed and the cause heard in this Court.

Manton, U. S. C. J.

[fol. 158] IN UNITED STATES CIRCUIT COURT OF APPEALS

AMENDED ANSWER OF HARRY LUBER

To the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit:

The amended answer of Harry Luber, intervening petitioner herein, to the libel of the Morse Dry Dock & Repair Company against

the Steamship "Northern Star," her engines, tackle, etc., and against all persons claiming any interest therein, in a cause of action, civil and maritime, alleges upon information and belief as follows:

First. He admits the matters alleged in the First Article of the libel.

Second. He admits the matters alleged in the Second Article of the libel.

Third. He denies the matters alleged in the Third Article of the libel.

Fourth. He denies that he has any knowledge or information sufficient to form a belief as to the matters alleged in the Fourth, Fifth and Seventh Articles of the libel.

Fifth. He denies the matters alleged in the Sixth Article of the libel.

Sixth. He admits the matters alleged in the Eighth Article of the libel.

Seventh. He admits the admiralty and maritime jurisdiction of the United States and of this Honorable Court. He denies the other matters alleged in the Ninth Article of the libel.

Eighth. Further answering and as a separate and complete defense herein, he alleges that:

On or about the 9th day of August, 1920, the American Star Line, [fol. 159] Inc., the owner and holder of legal title to the steamship "Northern Star," for value received and to secure the payment of the balance of the purchase price of said vessel, executed and delivered a preferred mortgage of the Steamship "Northern Star," her tackle and appurtenances, to the United States of America in the sum of one million two hundred seventeen thousand four hundred thirty-seven and 50/100 dollars ($1,217,437.50). The said indebtedness of one million two hundred seventeen thousand four hundred thirty-seven and 50/100 dollars ($1,217,437.50) was further evidenced by ten (10) promissory notes duly executed by the said American Star Line, Inc., and delivered to the United States of America, the payment of which notes was secured by the aforesaid mortgage. By the terms of the aforesaid mortgage, failure to pay the interest or principal of any of the aforesaid notes when each became due constituted a default thereunder which gave the United States of America the right to foreclose the said mortgage and recover the entire indebtedness thereunder as a maritime lien by an action in rem against the Steamship "Northern Star."

By the terms of the aforesaid mortgage on the Steamship "Northern Star," given by the American Star Line, Inc., to the United States of America, the creation of any maritime liens upon the Steamship "Northern Star," other than that of the preferred mort-

gage aforesaid, or of any other liens which would rank prior to the lien of the mortgagee was prohibited, and the libelant, Morse Dry Dock & Repair Company, cannot have any lien on said vessel for the repairs, supplies and services alleged in the libel.

The American Star Line, Inc., defaulted in the payment of the [fol. 160] interest and principal amounts of the said notes, and the right thereupon accrued to the United States of America under the aforesaid preferred mortgage to collect the entire indebtedness thereunder as a maritime lien by an action in rem against the Steamship "Northern Star." The said mortgage indebtedness, immediately upon the aforesaid default, constituted and still constitutes a preferred maritime lien against the Steamship "Northern Star," her engines, tackle, apparel, etc., and any proceeds of sale thereof.

On or about the 4th day of August, 1923, the United States of America duly assigned all its right, title and interest in the aforesaid mortgage and the notes secured thereunder to the intervening petitioner herein, and the said intervening petitioner, upon delivery of the said mortgage and notes, which was duly made, became and is the present holder thereof and is entitled to the recovery herein. By reason of the premises he is the holder of a preferred maritime lien against the Steamship "Northern Star," her engines, tackle, etc., and any proceeds thereof, and he is entitled to full payment of the mortgage indebtedness up to the amount of one million two hundred seventeen thousand four hundred thirty-seven and 50/100 dollars ($1,217,437.50) before any payments are made to the libelant, Morse Dry Dock & Repair Company, from the proceeds of sale of the Steamship "Northern Star," her engines, tackle, apparel, etc.

Ninth. Further answering and as a separate and complete defense herein, he alleges that:

On or about the 24th day of December, 1919, the United States [fol. 161] of America, which was then the owner and holder of legal title to the Steamship "Northern Star," ex "Waterbury," acting by and through the United States Shipping Board for good and valuable consideration, duly made an agreement with the American Star Line, Inc., for the sale of the Steamship "Northern Star," ex "Waterbury," to the American Star Line, Inc. The said agreement will be produced upon the hearing of this cause, and is hereby made a part hereof. By the terms of the aforesaid agreement for sale of the Steamship "Northern Star," ex "Waterbury," the creation of any maritime liens upon the Steamship "Northern Star," other than that of the preferred mortgage aforesaid, or of any other liens, encumbrances or charges upon said vessel was prohibited. By reason of the premises, the libelant, Morse Dry Dock & Repair Company, cannot have any lien on said vessel for the repairs, supplies and services alleged in the libel, and the intervening petitioner is entitled to full satisfaction of the amount due him prior to any payment to the libelant, Morse Dry Dock & Repair Company.

Wherefore, the intervening petitioner prays that the libel herein be dismissed with costs and that he be granted such other and further relief as the Court may deem just in the premises.

Yours, etc., Gerson C. Young, Proctor for Intervening Petitioner.

Office & Post Office Address: 80 Maiden Lane, Borough of Manhattan, City of New York.

[fol. 162] Sworn to by Harry Luber. Jurat omitted in printing.

[fol. 163] In United States Circuit Court of Appeals

Amended Intervening Petition of Harry Luber

To the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit:

The amended intervening petition and libel of Harry Luber against the Steamship "Northern Star," her engines, boilers, etc., and proceeds of sale thereof, and against all persons intervening for their interests or claiming any interest therein, in a cause of action, civil and maritime, alleges on information and belief as follows:

First. At all the times hereinafter mentioned, the libelant was, and still is, a citizen of the United States of America, and a resident of the Borough of Brooklyn, County of Kings, City of New York.

Second. At all the times hereinafter mentioned the American Star Line, Inc., was and still is, a corporation organized and existing under the laws of the State of New York.

Third. The Steamship "Northern Star" now is, or during the pendency of process hereunder, will be within the jurisdiction of the United States and of this Honorable Court.

Fourth. On or about the 9th day of August, 1920, the American Star Line, Inc., the owner and holder of legal title of the Steamship "Northern Star," her tackle and appurtenances, for value received and to secure the payment of the balance of the purchase price of said vessel, duly executed and delivered a preferred mortgage of the Steamship "Northern Star," her tackle and appurtenances, to the United States of America, acting by and through the United States Shipping Board, in the sum of one million two hun-[fol. 164] dred seventeen thousand four hundred thirty-seven and 50/100 dollars ($1,217,437.50).

Fifth. Said preferred mortgage was duly recorded by the Collector of Customs at the Customs House at the port of New York, in the Book of Mortgages PM-1, page 58, on or about August 11, 1920, and was duly endorsed on said vessel's documents, in accordance

with the requirements of Section 30 of the Act of June 5, 1920, known as the "Ship Mortgage Act, 1920," and all the requirements of law necessary to give complete priority to the aforesaid mortgage were and have been fully complied with.

Sixth. The said indebtedness of one million two hundred seventeen thousand four hundred thirty-seven and 50/100 dollars ($1,217,437.50) from said American Star Line, Inc., to the United States of America was further evidenced by ten (10) promissory notes totaling one million two hundred seventeen thousand four hundred thirty-seven and 50/100 dollars ($1,217,437.50), duly executed by the said American Star Line, Inc., and delivered to the United States of America, the payment of which notes and other interest thereon is secured by the aforesaid mortgage.

Seventh. The said preferred mortgage, a copy of which will be produced upon the trial hereof and which is hereby made a part of this intervening petition and libel, contained, among others, the following provisions:

"Article II—Default

"Section I. In case any one or more of the following events [fol. 165] herein termed events of default, shall happen, viz:

"(a) default for more than fifteen days after it falls due in the payment of any instalment of interest on any of said notes; or

"(b) default in the due and punctual payment of the principal of any note when the same shall become due; or * * * then and in such and very such case the party of the second part thereupon may:

"(a) Declare all outsanding notes to be immediately due and payable, whereupon all of said notes shall, upon such declaration, become due and payable immediately and shall bear interest thereafter at the rate of six per centum per annum upon the amount of principal and interest then due thereon;

"(b) Recover judgment for any amount due upon said notes or any of them, either by their terms or by virtue of such declaration, and collect the same out of any property of the party of the first part; * * *

"(d) Retake the vessel wherever the same may be and sell the same free from any claim by the party of the first part in law, in equity, in admiralty, or by statute * * *"

Eighth. On or about August 4, 1923, the United States of America represented by the United States Shipping Board, acting by and through the United States Shipping Board Emergency Fleet Corporation, for good and valuable consideration, duly transferred, assigned, set over and delivered unto the intervening petitioner and libelant, Harry Luber, the aforesaid preferred mortgage, and the

[fol. 166] notes payment whereof is secured thereby, as will more fully appear from a contract of assignment in writing dated August 4, 1923, which will be produced on the trial and is hereby made a part hereof.

Ninth. Although due demand was made therefor, the said American Star Line, Inc., failed to pay the principal and interest on the aforesaid notes as they fell due. The aforesaid failures to make said payments in accordance with the terms of the aforesaid mortgage and notes were unlawful and improper and constituted defaults under the terms of said mortgage and the United States of America thereupon duly declared all of said notes to be and they forthwith became due and payable as to the whole of principal and interest as provided in said notes and mortgage. No part thereof has been paid although due demand has been made therefor.

Tenth. By reason of the premises and by virtue of the provisions of the "Ship Mortgage Act, 1920," the said mortgage indebtedness of one million two hundred seventeen thousand four hundred thirty-seven and 50/100 dollars ($1,217,437.50) with interest thereon, constituted and still constitutes, a preferred maritime lien against the Steamship "Northern Star," her engines, tackle, apparel, etc., and any proceeds of sale thereof; and the intervening petitioner and libelant herein is entitled to enforce said lien against said vessel, etc., or any proceeds thereof by suit in rem in admiralty and is entitled to full satisfaction of the aforesaid indebtedness prior to any payment to the libelant, Morse Dry Dock & Repair Company.

[fol. 167] Eleventh. By the terms of the aforesaid mortgage on the Steamship "Northern Star" given by the American Star Line, Inc., to the United States of America, the creation of any maritime liens upon the steamship "Northern Star," other than that of the preferred mortgage aforesaid, or of any other liens which would rank prior to the lien of the mortgagee was prohibited, and the libelant herein cannot have any lien on said vessel for the repairs, supplies and services alleged in the libel. By reason of the premises, the intervening petitioner and libelant herein is entitled to full satisfaction of the amount due him under the aforesaid mortgage, prior to any payment to the libelant, Morse Dry Dock & Repair Company.

Twelfth. On or about the 24th day of December, 1919 the United States of America, which was then the owner and holder of legal title to the Steamship "Northern Star," ex "Waterbury," acting by and through the United States Shipping Board for good and valuable consideration, duly made an agreement with the American Star Line, Inc., for the sale of the Steamship "Northern Star," ex "Waterbury," to the American Star Line, Inc. The said agreement will be produced upon the hearing of this cause, and is hereby made a part hereof. By the terms of the aforesaid agreement for sale of the Steamship "Northern Star," ex "Waterbury," the creation of any maritime liens upon the Steamship "Northern Star,"

other than that of the preferred mortgage aforesaid, or any other liens, encumbrances or charges upon said vessel was prohibited. By reason of the premises, the libelant, Morse Dry Dock & Repair Company, cannot have any lien on said vessel for the repairs, supplies [fol. 168] and services alleged in the libel, and the intervening petitioner is entitled to full satisfaction of the amount due him prior to any payment to the libelant, Morse Dry Dock & Repair Company.

Tirteenth. All and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

Wherefore, the intervening petitioner and libelant prays that:

(1) Process in due form of law according to the course and practice of this Honorable Court in such cases, may issue against thhe Steamship "Northern Star," her boilers, engines, tackel, apparel, furniture and fixtures.

(2) The aforesaid preferred mortgage may be enforced as such upon, and against, said steamship, her boilers, engines etc., and the proceeds of sale thereof.

(3) The aforesaid mortgage may be determined and adjudged to be a preferred mortgage, and to be a first lien upon said steamship, her boilers, engines, etc. and the proceeds of sale thereof, prior and superior, to that of all other claims liens and demands thereon.

(4) The Steamship "Northern Star," her boilers, engines etc. may be sold under the order of this Court and the intervening petitioner and libelant may be paid from the proceeds of sale thereof the sum of $1,217,437.50 with interest and costs.

(5) The intervening petitioner and libelant may have such other [fol. 169] and further relief as may be just in the premises.

Gerson C. Young, Proctor for Intervening Petitioner and Libelant.

Office and P. O. Address: 80 Maiden Lane, Borough of Manhattan, City of New York.

Sworn to by Harry Luber. Jurat omitted in printing.

[fol. 170] In United States Circuit Court of Appeals

Answer to Amended Petition of Morse Dry Dock & Repair Co.

To the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit:

The amended answer of Morse Dry Dock and Repair Company to the amended intervening petition and libel of Harry Luber against the Steamship "Northern Star," her engines, boilers, etc., and

any proceeds of sale thereof, and against all persons intervening for their interests or claiming any interest therein, in a cause of action, civil and maritime, alleges on information and belief as follows:

First. It admits the matters alleged in the "Second" and "Thirteenth" paragraphs of the amended intervening petition and libel.

Second. Denies any knowledge or information sufficient to form a belief as to the matters alleged in paragraphs "First," "Third," "Sixth," "Seventh," "Eighth" and "Ninth" of the amended intervening petition and libel.

Third. Denies the matters alleged in paragraphs "Fifth," "Tenth" and "Eleventh" of the amended intervening petition and libel.

Fourth. Admits, as alleged in paragraph "Fourth" of the amended intervening petition and libel, that on or about the 9th day of August, 1920, the American Star Line, Inc., was the owner and holder of the legal title of the Steamship "Northern Star," her tackle and appurtenances, but denies any knowledge or information [fol. 171] sufficient to form a belief as to all the other allegations contained in said paragraph.

Fifth. Denies any knowledge or information sufficient to form a belief as to the matters alleged in paragraph "Twelfth" of the amended intervening petition and libel, and further alleges in respect thereto, that on or about the 30th day of December, 1919, the United States of America, which was then the owner and holder of the legal title to the Steamship "Northern Star," ex "Waterbury," acting by and through the United States Shipping Board for a good and valuable consideration, duly executed and delivered to the said American Star Line, Inc., an absolute and unconditional bill of sale for the said Steamship "Northern Star," the said bill of sale will be produced upon the hearing of this cause and is hereby made a part hereof. The said bill of sale was received for record at the office of the Collector of Customs, at the Custom House in the port of New York, on the 11th day of August, 1920 and was duly recorded in the records of said Custom House on the same day in Book R, 171, No. 6. That by virtue of said bill of sale, the said American Star Line, Inc., became the absolute owner of said Steamship "Northern Star."

Barber & Stetson, Proctors for Morse Dry Dock & Repair Company, Libelant-Appellant.

[fol. 172] Sworn to by R. R. Piper. Jurat omitted in printing.

[fol. 173] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MORSE DRY DOCK & REPAIR COMPANY, Libellant-Appellant,

against

Steamship "NORTHERN STAR," Her Engines, etc.; HARRY LUDEN, Intervening Petitioner and Libellant-Appellee

STIPULATION

It is hereby stipulated and agreed by and between the proctors for the respective parties hereto for the purpose of the hearing of this cause, as follows:

First. That a photostat copy of a certain document purporting to be an agreement for sale of the S. S. "Northern Star," ex "Waterbury," which is annexed hereto and marked Exhibit "A" and made a part hereof, the due execution of which is admitted, be and it is hereby offered in evidence with the same force and effect as though it were the original of said document. That said agreement was duly executed in duplicate and one duplicate original of said agreement was delivered to the American Star Line, Inc., which kept it on file at its offices at 25 Beaver Street, New York City. The other duplicate original was retained by the United States Shipping [fol. 174] Board and placed and kept on file at its offices in Washington.

Second. That a certified copy of a certain document, purporting to be a bill of sale of the S. S. "Northern Star" ex "Waterbury" annexed hereto marked Exhibit "B" and made a part hereof, the due execution of which is admitted, be and it is hereby offered in evidence with the same force and effect as though it were the original of said bill of sale.

Third. That the right of either party to raise any objection to the admissibility of the before-mentioned documentary proof, at the trial of this cause before this Court, is hereby expressly reserved except as herein stipulated.

Fourth. That the word "of" in the 12th line on page 20a of the transcript of record be, and it hereby is changed to the word "or"; that the document marked Morse Exhibit 1B, comprising pages 80 and 91 of the transcript of record, be and it hereby is expunged from said record and that there be substituted therefor, the attached Exhibit "C" which is to be marked petitioner's Exhibit 1B and considered a part of the mortgage comprising pages 71 and 92 inclusive of the transcript of record.

Fifth. That this stipulation and the exhibits attached hereto, as well as the notice of motion and affidavit of Michael N. Shuman, dated and verified respectively September 2nd, 1924, and the order

entered herein on September 29, 1924, also the supplemental and [fol. 175] amended pleadings filed herein following and under consisting of the amended petition and the amended answer of Shore Labor, Intervening Petitioner, and the answer of the Morse Dry Dock & Repair Company to the said amended petition, shall be printed and annexed as supplementary to the record herein for submission to this court on the appeal herein.

Dated October 23, 1924.

Butler & Stetson, Proctors for Libellant-Appellant. Cornelius C. Young, Proctor for Shore Labor, Intervening Petitioner and Libellant-Appellee.

In United States Circuit Court of Appeals

Exhibit "A" on Extension

United States of America,

[Seal.]

United States Shipping Board

April 3, 1924.

I hereby certify that the annexed is a true and correct photostat copy of an original purchase agreement bearing date December 26, 1919, executed by and between the United States of America, represented by the United States Shipping Board and the American Star Line, Inc., a New York State corporation, for the purchase of the [fol. 176] American steel vessel Winnebago, Official Number 218,258, the original of which is on file in the United States Shipping Board.

In witness whereof, I have hereunto set my hand, and caused the seal of the United States Shipping Board to be affixed, on the day and year first above written.

Carl F. Kinnan, Secretary United States Shipping Board.
(Seal of the United States Shipping Board.)

Standard Form of Purchase Agreement

This agreement made this 26th day of December, 1919, between the United States of America, by and through United States Shipping Board hereinafter called the Seller, and American Star Line, Inc., a corporation organized under the laws of the State of New York, with an office at 25-27 Beaver Street, the City of New York, N. Y., and hereinafter called the Buyer,

Witnesseth:

That the Seller hereby agrees to sell to the Buyer, and the Buyer hereby agrees to purchase from the Seller, that certain steel vessel

named the "Waterbury," official number 219,134, registered at the [fol. 177] Port of ——, now at ——, of about — tons gross and — tons net register, classed —— in ——, upon the following terms and conditions:

1. The purchase price of said vessel is a sum computed at the rate of $215.00 per deadweight ton on the deadweight tonnage of said vessel, which is 7,550 tons, which figure is accepted by both parties as final, conclusive and binding as to the tonnage in respect to which the purchase price herein mentioned is computed, and any variation from said figure of deadweight tonnage which may appear by actual measurement or otherwise shall not affect the amount of the purchase price.

2. The Buyer has deposited with Seller on the execution of this agreement the sum of $50,000 on account of said purchase, and agrees to pay said purchase price to the Seller in gold coin of the United States, or its equivalent in current funds, as follows:

25 per cent thereof on the closing date provided and defined in paragraph 3 hereof (the $50,000 heretofore deposited by the Buyer with the Seller to be applied on said 25 per cent payment); and
12½ per cent thereof 6 months after said closing date,
12½ per cent thereof 12 months after said closing date,
6¼ per cent thereof 18 months after said closing date,
[fol. 178] 6¼ per cent thereof 24 months after said closing date,
6¼ per cent thereof 30 months after said closing date,
6¼ per cent thereof 36 months after said closing date,
6¼ per cent thereof 42 months after said closing date,
6¼ per cent thereof 48 months after said closing date,
6¼ per cent thereof 54 months after said closing date,
6¼ per cent thereof 60 months after said closing date.

Payments maturing after the closing date shall bear interest from said date at the rate of 5 per cent per annum, payable semi-annually, and shall be evidenced by promissory notes of the Buyer secured by a first mortgage on said vessel, substantially in the form hereto attached, marked "Exhibit A." All maturities shall be subject to the right of the Seller to declare all instalments immediately due and payable in case of default by the Buyer hereunder or under said mortgage.

At the closing date, the Buyer may, at its option, in lieu of giving said notes and mortgage above provided, pay to the Seller, in gold coin of the United States or its equivalent in current funds, such amount of the purchase price as is herein provided to be represented by said notes, less two per cent of said purchase price as a cash discount.

3. On Dec. 29th, 1919, at 11.00 o'clock in the forenoon, at the office [fol. 179] of United States Shipping Board, New York City, the Seller will execute and deliver to the Buyer a good and sufficient bill of sale of said vessel, bargaining and selling to the Buyer all right, title and interest of the United States of America in and to said vessel,

warranted free from all liens, together with certificate of its aforesaid class and certificate of maintenance of class (which vessel shall be deemed delivered simultaneously), but only on the following conditions:

(a) That the Buyer pays to the Seller the 25 per cent instalment of the purchase price as above provided;

(b) That the Buyer executes and delivers to the Seller the mortgage and notes herein provided for;

(c) That the Buyer pays to the Seller the cost to the Seller of any wireless equipment then on the vessel and owned by the Seller and the market value of all engine-room and steward's and other stores aboard said vessel, including bunker coal and other fuel, oil, paints and similar stores, and all deck supplies, such value to be based upon the master's inventory which the Buyer shall have opportunity to verify in the usual way.

The time herein set for delivery of the bill of sale and certificate is subject to such adjournment as the Seller may require, not exceeding thirty days, in order to obtain the certificate of maintenance of class, and to such other or further adjournment, or to such anticipation, as the parties may duly mutually agree upon and said time [fol. 180] as so adjourned or anticipated is the closing date referred to throughout this agreement.

4. If the Seller is unable for any reason to make delivery of said vessel and pass the required papers, at such closing date, the Buyer shall then have the option of accepting at the full purchase price herein provided, such performance as the Seller is able to make, or of cancelling this agreement; and in case of such cancellation the Seller shall promptly return to the Buyer the $50,000 paid on account of the purchase price of said vessel; but the Seller shall in no event be liable to the Buyer for damages resulting from the inability of the Seller so to perform in whole or in part.

5. If the Buyer makes default in performing any of the conditions to be performed by the Buyer at said closing date as herein provided, the Seller shall be released of all obligation regarding said vessel and the $50,000, paid on account, shall be retained as liquidated damages sustained by the Seller in preparing to make delivery of said vessel, but without prejudice to the Seller's right to such further damages as the Seller may sustain in consequence of such default of the Buyer.

6. From the time of delivery by the Seller of the bill of sale of said vessel, and until the payment in full of the notes to be given by the Buyer, and until the performance of all other obligations of the Buyer hereunder, the Buyer agrees:

(a) That the buyer will, at its own expense, keep said vessel in- [fol. 181] sured for an amount in dollars at least equal to 25 per cent more than the amount which shall from time to time remain unpaid upon said notes, and interest thereon, with policy valuation not exceeding the amount insured, with responsible underwriters in good

standing, approved by the Seller, under marine insurance policies approved by competent marine insurance brokers and adjusters satisfactory to the Seller, covering against the risks usually covered by such policies at the time, including loss or damage by fire, with customary Inchmaree and Four-Fourths Running Down Clause, and policy franchise or deductible average not to exceed five per cent, and including loss or damage by the elements, perils of the sea and marine risks and disasters, including stranding and liability for damage to said vessel and other vessels by collision and under American Hull Underwriters form of policy or such other form as the Seller may approve, disbursement insurance to such amount as underwriters will allow being permitted; and will also at its own expense keep said vessel fully entered in a protection and indemnity association or club in good standing, in both protection and indemnity classes or covered in the amount above specified by protection and indemnity clause of like effect in marine insurance policies; further will at its own expense keep said vessel insured in like amount by war risk insurance whenever and so long as the Seller shall request that [fol. 182] such insurance be carried. All insurance by its terms shall be payable to the United States Shipping Board as its interest may appear and the policies or binders therefor delivered to the Seller; except that in case said vessel be entered in a protection and indemnity association or club, the Buyer shall be required only to enter itself as a member and the requirements as to delivery of policies or binders to the Seller shall not be applicable but a certificate of the brokers representing the club shall be furnished to the Seller showing compliance with the requirements hereof. In lieu of carrying the aforesaid insurance, the Buyer will, as and when from time to time required by the Seller, insure at its own expense in like manner and to the same extent with the United States Shipping Board or with some other agency of the United States, in which event the Buyer will pay the premiums therefor to the Board or to such other agency at the customary commercial rates for such insurance, as the same may be certified from time to time by any of the aforesaid marine insurance brokers and adjusters. In case of partial loss, if the Buyer is not in default under this agreement or the said mortgage, the Board shall consent to the payment by the underwriters direct, of all bills incurred for repairs which may be covered by said insurance.

(b) That the Buyer will not do nor voluntarily suffer nor permit any act to be done whereby any insurance is or may be sus- [fol. 183] pended, impaired or defeated nor will the Buyer suffer or permit said vessel to engage in any voyage or to carry any cargo deemed by underwriters extra hazardous on account of fire, marine risks or war risks, nor will the Buyer cause, suffer or permit said vessel to be operated in any manner contrary to any reasonable rules and regulations which the United States Shipping Board may from time to time prescribe for said vessel and other vessels sold or leased by the Board under agreements similar hereto.

(c) That the Buyer will not suffer or permit to be continued any lien, encumbrance or charge which has or might have priority over

the mortgage of said vessel to the Seller; but the Buyer will in due course, and in any event within thirty days after the same becomes due and payable, pay, discharge or make adequate provision for the satisfaction or discharge of all lawful claims or demands which, if unpaid, might, in equity, in admiralty, at law or by any statute of this or any other nation where said vessel may be navigating or berthed, have such priority over the said mortgage, or might operate as a lien, encumbrance or charge upon said vessel, or cause its detention in port; or will cause said vessel to be released or discharged from any such lien, encumbrance or charge in any event within thirty days after such lien, encumbrance or charge is imposed upon said vessel, provided, however, that this provision shall not apply [fol. 184] to the extent that there may be pending on behalf of either of the parties hereto with solvent underwriters, not yet having paid or formally rejected, a claim for reimbursement on account of the matter upon which any such lien is alleged to be founded nor to the extent that the Seller has or has received insurance properly applicable as reimbursement on account of such matter, or to the payment or discharge thereof; always, however, subject to the condition that the said vessel be discharged from any libel, attachment or other detention under process or color of legal authority within thirty days from the time when the same attaches.

(d) That the Buyer will at all times, at its own expense, maintain and preserve said vessel in as good condition, working order and repair as at the date of said bill of sale, so far as may be reasonably practicable, ordinary wear and tear and depreciation excepted, and will keep it in such condition as will entitle it to the highest classification and rating for vessels of its age and type in the classification bureau issuing the certificate of maintenance of class above mentioned; and will annually and at such other times as the Seller may determine furnish to the Seller a certificate by such bureau that such class has been maintained.

(e) That the Buyer will at all reasonable times afford the Seller or its authorized representative full and complete access to said ves- [fol. 185] sel for the purpose of inspecting the same and its cargo and ship papers and will likewise at all reasonable times permit the Seller or its duly authorized representative to examine its minutes, books of account, records, files and documents. If the Seller from any such examination shall deem its interest in said vessel to be at any risk or hazard it may, at the expense of the Buyer, place its authorized representative upon said vessel, with authority to be advised of all the operations and records thereof.

(f) That this agreement will be carried as a part of the ship's papers; and that metal plates bearing the words "United States Shipping Board, Mortgagee" shall be maintained by the Buyer in one or more conspicuous places upon said vessel, the location of which the Seller shall determine, and may change from time to time, and that the Buyer shall take such other appropriate steps as designated to it by the Seller from time to time or required by the circumstances,

as will give notice to the world that the Buyer's right, title and interest in the said vessel is subject to the said mortgage and to this agreement, and that the Buyer has no right, power or authority to suffer or permit to be imposed on or against said vessel any liens or claims which might be deemed superior to, or a charge against, the interest of the Seller in said vessel.

(g) That the Buyer will pay and discharge, when due and payable from time to time, all taxes, assessments and governmental [fol. 186] charges, fines or penalties lawfully imposed on said vessel or upon the income and profits thereof.

(h) That the Buyer will reimburse the Seller promptly, with interest at the rate of six per cent per annum, for any and all expenditures which the Seller may make from time to time in providing such protection in respect of insurance, discharge of liens and taxes, repairs and other matters as the Buyer is obligated under this paragraph 6 to provide but fails to provide; but the Seller shall be under no obligation to the Buyer to make any such expenditure, nor shall the making thereof affect the Buyer's default in that regard.

(i) That the Buyer will not issue any stocks, bonds or similar securities without first obtaining the written consent thereto of the Seller.

(j) That the Buyer will not, without the consent of the Seller make any distribution of profits in the forms of dividends or otherwise, except a reasonable return, not exceeding 7 per cent, upon the actual cash capital paid into the corporation, out of net operating revenue properly applicable to dividends nor except semi-annually after paying or providing for the payment of all obligations to the Seller theretofore matured or maturing during such semi-annual period provided, that if, and when, the Buyer shall have paid to the Seller one-half of the purchase price of said vessel, without thereby increasing the indebtedness of the Buyer, and if, at such time or thereafter, the Buyer shall have net liquid or quick assets [fol. 187] of at least 12½ per cent of said purchase price plus 12½ per cent of any other capital investment of the Buyer, then the Buyer may distribute from its net operating revenue, thereafter earned, such dividends as will not impair the amount of said liquid or quick assets, after first paying or providing for the payment of all obligations to the Seller theretofore matured or maturing during the semi-annual period next ensuing. A certificate from a responsible firm of public accountants, selected by the Buyer and satisfactory to the Seller, showing a compliance with the provisions of this subdivision (j), shall authorize the Buyer to make such distribution from its net operating revenue in accordance with the terms hereof, upon the filing with the Seller of such certificate.

(k) That the Seller may require the vessels, purchased by the buyer from the Seller, to be transferred to a separate corporation to be organized by the Buyer for the purpose of taking title thereto and operating the same.

(1) That the Buyer will not, without written consent of the Seller first obtained, make any sale, mortgage, pledge or other transfer of said vessel or of any interest therein, and such written consent to any one such transfer shall not be deemed a waiver of this provision in respect to any subsequent proposed transfer; any such consent shall upon the condition that the transferee shall expressly assume all obligations of the Buyer under this agreement and upon its said [fol. 188] notes, and no such consent shall affect any of said obligations of the Buyer; but the Buyer may charter said vessel for uses lawful for American vessels, subject to all the provisions of this agreement and of said mortgage.

7. No warranty of condition of said vessel nor guaranty of capacity thereof is made by the Seller.

8. The Seller shall act in respect of this agreement and the said notes and mortgage through United States Shipping Board, its duly authorized officers, agents and representatives or through such other representatives as shall from time to time be duly constituted for such purpose. In the event that this agreement or the said notes or the said mortgage, or any provision of any thereof, be deemed invalidated in whole or in part by any present or future law of the United States or any decision of any authoritative court thereof, then the parties hereto agree to execute such other or further instrument as in the opinion of counsel for the Board will carry out the true intent and spirit of this agreement and the parties hereto agree from time to time to execute such further assurances as in the opinion of such counsel may be required to adequately safeguard the rights of the parties hereunder and carry out the spirit and intent of this agreement.

9. This agreement shall bind and benefit the parties hereto and their successors and assigns (without, however, waiving the covenent against such assignment contained in paragraph 6 hereof) and this agreement shall not be deemed to grant any rights to any third parties

[fol. 189] except such specific rights as the holders from time to time of the notes herein provided for may acquire as such holders.

10. The Seller agrees to change the name of the said vessel from "Waterbury" to "Northern Star," and the Buyer hereby agrees to bear all expenses incident thereto.

11. The Seller further agrees to allow the Buyer the sum of twenty-two thousand five hundred dollars ($22,500.00) in lieu of repairs to cracked cylinder casting and in consideration of the acceptance of the said vessel "as is," subject, however, to the Sellers procuring for the Buyer certificate of class above mentioned. It is understood and agreed that this clause shall in no way relieve the Buyer from his obligation to maintain the class above mentioned.

In Witness Whereof, the parties hereto have caused this instrument to be subscribed in duplicate in their respective names and

their respective seals to be hereunto affixed the day and year first above written.

United States of America, by United States Shipping Board, by John Barton Payne, Chairman. W. W. Nottingham, Asst. Counsel. American Star Line, Inc., by Moses Ginsberg, Pres.

Attest: John J. Flaherty, Secretary.
Attest: Chas. Kanner, Secretary.

[fol. 190] DISTRICT OF COLUMBIA, ss:

I, U. J. Gendron, a Notary Public in and for the District of Columbia, do hereby certify that John Barton Payne, who is chairman of the United States Shipping Board, which said Shipping Board, for and on behalf of the United States of America, executed a certain purchase agreement bearing date on the 24th day of December 1919 hereto annexed, personally appeared before me in said District of Columbia, the said John Barton Payne, being personally well known to me as the chairman of said Shipping Board which executed for and on behalf of the United States of America the said purchase agreement, and acknowledged to me that he executed the same as chairman of said Shipping Board, and that the same is the free and voluntary act and deed of said United States of America, through the said United States Shipping Board, and of himself as such chairman, for the uses and purposes therein expressed.

Given under my hand and seal this 13th day of January 1920.

U. J. Gendron, Notary Public. My commission expires Oct. 30, 1922.

STATE OF ——,
County of ——, ss:

On the — day of ——, nineteen hundred and ——, before me came —— ——, to me known, who, being by me duly sworn, did [fol. 191] depose and say that he resides in ——; that he is the —— of ——, the corporation described in, and which executed, the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation; and that he signed his name thereto by like order.

—— ——, Notary Public. My commission expires —— —, ——.

Last Proof—Subject to Final Revision

(Series M. H., Arc., 8-6-'19)

Standard Form of Mortgage—Mortgage of Registered Vessel

From: —— ——.
To: United States of America.

To all to whom these presents shall come, Greeting:

Know ye, That the undersigned —— ——, a corporation of the State of ——, doing business at ——, in the City of ——, sole owner of the — vessel called ——, of the burden of — tons, or thereabouts, party of the first part, being justly indebted to the United States of [fol. 192] America, party of the second part, acting by and through United States Shipping Board, in the sum of — dollars, upon the purchase price of said vessel, has for the purpose of securing the payment of the said debt and the interest thereon, granted, bargained, sold and mortgaged and by these presents does grant, bargain, sell and mortgage, unto the said party of the second part, and its assigns, the whole of said vessel, together with her boilers, machinery, masts, bowsprits, boats, anchors, cables, rigging, tackle, apparel, furniture, and all other appurtenances thereunto appertaining and belonging and the earnings, income, revenue, rents, issues and profits of said vessel, and also any and all additions, improvements and replacements hereafter made in or to said vessel or any part thereof, or in or to its equipment and appurtenances aforesaid. The certificate of the last registry of the said vessel is in the words and figures as per the copy thereof annexed hereto.

To have and to hold the said vessel and all other before-mentioned appurtenances unto the said United States of America, and its assigns, to the sole and only proper use, benefit, and behoof of the said United States of America, and its assigns, forever:

Provided, always, and the condition of these presents is such, that if the said party of the first part, shall pay or cause to be paid, to the said party of the second part, or its assigns, the debt aforesaid with the interest thereon, at the time or times and in the manner following, to wit: by paying on the respective dates of their maturity, each and every of ten pormissory notes, of the following [fol. 193] amounts and maturities:

For $—, maturing —— —, 1920.
" $—, " —— —, 1920.
" $—, " —— —, 1921.
" $—, " —— —, 1921.
" $—, " —— —, 1922.
" $—, " —— —, 1922.
" $—, " —— —, 1923.
" $—, " —— —, 1923.
" $—, " —— —, 1924.
" $—, " —— —, 1924.

all of which notes, save for their respective amounts and dates of maturity are in form and substance as follows:

"No. —. New York City, —— —, 1919.

$1—.

On or before the — day of ——, 19—, for value received, the undersigned promises to pay to the United States of America, at the office of the United States Shipping Board, Washington, D. C., in gold coin, or its equivalent in funds current in New York City, the sum of $—, together with interest thereon, from the date hereof, in like coin, or such equivalent at the rate of — per cent per annum, payable semi-annually.

"This note is one of a series of ten notes, totalling —, of like form and tenor, save for their respective amounts and dates of maturity; all given in payment for the American — steamer ——, official number —, in accordance with the terms of an agreement dated —— —, 1919, between the parties hereto. Each of said notes is secured by a first mortgage upon the said vessel. If default be made in the [fol. 194] prompt and faithful payment of this or any of said notes, or in the performance of any of the covenants and conditions of said mortgage, or of the terms and conditions of said agreement between the parties hereto for the purchase of said steamer, this note shall immediately become due and payable.

"In the event of suit to collect this note, the undersigned agrees to pay reasonable attorney's fee."

and by paying interest on all of said notes semi-annually; and shall duly perform all the provisions, on its part to be performed, of that certain agreement between the parties hereto for the purchase of said vessel (hereinafter called the "Purchase Agreement"), dated —, 1919, then these presents shall be void and of no effect subject, however, to the provisions hereinafter contained; and the said party of the first part hereby agrees to pay the debt aforesaid, and interest thereon, and said insurance premiums, and to fulfill and perform each and every one of the covenants, agreements and conditions herein contained.

But if default be made in such payment, or in any one of such payments, or if default be made in the prompt and faithful performance of any of the covenants, agreements and conditions herein contained, or of any of the terms, conditions and agreements of said Purchase Agreement, or if the said party of the first part shall sell or attempt to sell said property, or any part thereof, or to transfer the flag of said vessel, without the written consent of the said party of the second part, or if the same shall be libeled or levied upon or [fol. 195] taken by virtue of any attachment or execution against said party of the first part, or otherwise subjected to lien or claim and not released within thirty days thereafter as provided in said Purchase Agreement, or if the said party of the first part shall remove, or attempt to remove, said vessel beyond the limits of the United States, save on voyages with the intention of returning to the United States, or if the said party of the first part shall negligently or will-

fully permit said property to waste or become unseaworthy, or be damaged or destroyed, or if the said party of the first part shall fail to procure, or shall violate any of the warranties or conditions of the insurance policies, or of the protection and indemnity insurance required by said Purchase Agreement, or if legal proceeding be instituted to place said vessel or any of the property of the party of the first part in the hands of a receiver, custodian or trustee in bankruptcy, or insolvency, then, and in every such case the party of the first part shall be deemed to have committed an act of default and the party of the second part thereupon may:

(a) Declare all outstanding notes to be immediately due and payable, whereupon all of said notes shall, upon such declaration, become due and payable immediately, and shall bear interest thereafter at the rate of six per cent per annum upon the amount of principal and interest then due thereon;

(b) Recover judgment for any amount due upon said notes or any of them either by their terms or by virtue of such declaration, and collect the same out of any property of the party of the first part;

[fol. 196] (c) Retake said vessel wherever the same may be found, and hold, lease, operate or otherwise use or dispose of said vessel for such times and upon such terms as the party of the second part may deem to its best advantage,

(d) Retake said vessel wherever the same may be found and sell the same free from any claim by the party of the first part in law, in equity, in admiralty or by statute, after first giving a printed notice for ten consecutive days (except Sunday) in some newspaper, published in the City of New York, State of New York, and in some newspaper, if any, published at the place of sale, which said sale may be held at such place or places and at such time or times as the party of the second part may specify, and may be conducted without bringing said vessel to the place of sale, and in such manner generally as the party of the second part may deem to its best advantage, and the party of the second part may become the purchaser at any such sale.

When any right to retake said vessel shall accrue, the party of the second part may retake the same wherever the same may be found without prior demand and without legal processes, and for that purpose may enter upon any dock, pier or other premises where said vessel may be; the party of the second part may take possession of said vessel upon the high seas or in any port, harbor or other place; but without impairing the said right, the party of the first part agrees upon demand to deliver said vessel at its own cost at such [fol. 197] place or places as the party of the second part may designate, and that the party of the second part shall have the right to dock said vessel at any dock, pier or other premises of the vessel without charge or to dock such vessel at any other place at the expense of the party of the first part, and further agrees that whenever any

judicial proceedings shall be commenced to enforce any right under this mortgage, then the party of the second part shall be entitled to exercise the right of entry and retaking and also any other rights and powers herein conferred and provided to be exercised by the party of the second part upon the happening of any event of default, and that in any such judicial proceedings the party of the second part shall be entitled as a matter of right to the appointment of a receiver or receivers of the vessel and of the earnings, income, revenue, rents, issues or profits thereof, with such powers as the court making such appointment shall confer.

Each and every power or remedy herein specifically given to the party of the second part shall be cumulative and shall be in addition to every other power or remedy herein specifically given, and now or hereafter given, at law, in equity, in admiralty, or by statute, and each and every power and remedy, whether specifically herein given or otherwise so existing, may be exercised from time to time and as often and in such order as may be deemed expedient by the party of the second part, and the exercise or the beginning of the exercise of any power or remedy shall not be deemed a waiver of the right to exercise, at the same time or hereafter, any other power or remedy. No delay or omission by the party of the second part or of any of the holders of said notes in the exercise of any right [fol. 198] or power accruing upon any act of default as above defined, shall impair any such right or power, or shall be construed to be a waiver of such act of default or an acquiescence therein; nor shall the acceptance by the mortgagee of any security or of any payment of a note or notes maturing after such act of default, or of any payment on account of any past default be deemed a waiver of any right to take advantage of any further act of default or of any past act of default not completely cured thereby.

If at any time after an act of default and prior to the actual sale of said vessel by the party of the second part, the party of the first part shall offer to completely cure all acts of default and to pay all expenses, advances and damages of the party of the second part, together with interest at the rate of 6 per cent per annum, consequent on such default, then the party of the second part may, in its discretion, but not as a matter of right, accept such offer and payment and restore the party of the first part to its former position, and thereupon cancel and annul any notices advancing the maturity of the notes and any notices of sale of the vessel; but no such cancellation or annulment shall affect any subsequent default, nor impair any rights consequent thereon. The party of the first part shall have the right so to cure any such act of default within fifteen days after notice of such default by the party of the second part.

The proceeds of any sale and the net earnings from any management, charter, other part of said vessel under any of the powers above specified and the proceeds of any judgment collected by the party [fol. 199] of the second part for any default thereunder together with the proceeds of any insurance and of any claims for damages on account of said vessel shall be applied as follows:

Cat. No. 1840
1917

The United States of America

DEPARTMENT OF COMMERCE
BUREAU OF NAVIGATION

BILL OF SALE OF REGISTERED VESSEL

(Secs. 4170, 4171, 4192, 4193, 4194, and 4196, Revised Statutes, and Arts. 53 and 57, Customs Regulations of 1915.)

To all to whom these Presents shall come, Greeting:

Know Ye, That* the United States of America, represented by the United States Shipping Board

do owner

of the Steel Steamship or vessel called the Northern Star
of New York NY & Waterbury

of the burden of 5174 gross and 3283 net tons, or thereabouts,
for and in consideration of the sum of One Million six hundred twenty three thousand two hundred fifty dollars ($1,623,250.00) dollars,
lawful money of the United States of America, to it in hand paid, before the sealing and delivery
of these presents, by† American Star Line Inc.
a corporation organized under the laws of the State of New York

the receipt whereof it does hereby acknowledge and is therewith fully satisfied,
contented, and paid, have bargained and sold, and by these presents do bargain and sell, unto the said†
American Star Line Inc. its successors and
assigns all the right, title and interest of the United
States of America in and to said Steel Steamship

~~heirs, executors, administrators, and assigns,~~
~~of the said~~ or vessel, together with all her engines, boilers, Machinery
the masts, bowsprit, sails, boats, anchors, cables, tackle, furniture, and all other necessaries thereunto appertaining and belonging; the latest CERTIFICATE OF REGISTRY of which said Steel Steamship or vessel is as follows, viz:

* Here insert the name and address of each vendor, and the part conveyed by him.
† Here insert the name and address of each vendee, and the part conveyed to him.

11—1844

EXHIBIT B (1)

202

A TRUE COPY OF THE LATEST CERTIFICATE OF REGISTRY

Insert "Permanent" or "Temporary." Permanent

Register No. 172

The United States of America

DEPARTMENT OF COMMERCE

BUREAU OF NAVIGATION

OFFICIAL NO.	LETTERS
219134	LGKH

Measured: ..... 1.....

Rebuilt at ..... 1.....

Remeasured: ..... 1.....

Radio Call: K.O.K.C.

Service: Ocean Freight

Number of Crew 50

Certificate of Registry

In Pursuance of Chapter One, Title XLVIII, "Regulation of Commerce and Navigation," Revised Statutes of the United States,

S A Webster of New York Ny Authorized Agent

having taken and subscribed the oath required by law, and having sworn that

United States of America

represented by

United States Shipping Board

is

the only owner of the vessel called the Waterbury of New York Ny.

whereof John E Curtis is at present master, and is a citizen of the United States, and that the said vessel was built in the year 1919, at Arlington, Ny, as appears by Certificate of Survey of Steel Shipbuilding Corporation builder, on file in this office and W. Berryman A.D. Surveyor having certified that the said vessel is a Steamship, has two decks, two masts, a plan head, and a Second stern; that her register length is 386.0/10 feet, her register breadth 52.2/10 feet, her register depth 27.1/10 feet, her height ..... 10 feet; that she measures as follows:

	TONS	100THS
Capacity under tonnage deck		
Capacity between decks above tonnage deck		
Capacity of inclosures on the upper deck, viz: Forecastle 69.57, bridge 342.06, poop 91.63, break, houses—number 12 3.05, side ..., chart 2.93, radio 5.18, excess hatchways 11.90, light and air 52.62	5174	
GROSS TONNAGE		
Deductions under Section 4153, Revised Statutes, as amended:		
Crew space, 176.31; Master's cabin, 10.09 Bone 3.76		
Steering gear, ...; Anchor gear, 13.54; Boatswain's stores, 17.91		
Chart house, 7.93; Donkey engine and boiler, ...; Radiohouse 5.14		
Storage of sails, ...; Propelling power (actual space, 677.84 (3.70) 1655.71		
I.H.P. 2500. TOTAL DEDUCTIONS		
NET TONNAGE	3283	

The following-described spaces, and no others, have been omitted, viz: Forepeak 345.0, aftpeak 10.0, open forecastle 28.3, open bridge ..., open poop ..., open shelter deck ..., anchor gear ..., steering gear 24.97, donkey engine and boiler ..., light and air 35.21, wheelhouse 7.07, galley 8.76, condenser Refrect 7.49, water-closets 10.24, cabins ...

and the said John E. Curtis having agreed to the description and admeasurement above specified, according to law, said vessel has been duly REGISTERED at this PORT.

Given under my hand and seal, at the Port of New York, this 25th day of November, in the year one thousand nine hundred and nineteen.

PLACE FOR SEAL OF NAVAL OFFICER

J. D. Wilson
Deputy Naval Officer.

PLACE FOR SEAL OF COLLECTOR

E J Donahue
Acting Deputy Collector of Customs.

SEAL OF THE DEPARTMENT OF COMMERCE

Eugene Tyler Chamberlain
Commissioner of Navigation.

11-164

EXHIBIT B (2)

202A

To have and to hold the said ~~Steel Steamship "Wyandotte"~~

and appurtenances thereunto belonging unto ~~it~~ the said American Star Line Inc.

its successors

~~heirs, executors, administrators,~~ and assigns, to the sole and only proper use, benefit, and behoof of ~~it~~ the said American Star Line Inc.

its successor and assigns forever.

~~heirs, executors, administrators, and assigns forever~~: And ~~it~~ the said United States of America through the United States Shipping Board hereby warrants that said Steel Steamship is free from all liens

~~the said covenanted, and agreed, and by these presents do promise, covenant, and agree for~~ heirs, executors, administrators, and assigns, to and with the said

~~heirs, executors, administrators, and assigns to warrant and defend the said~~

vessel and all the other before mentioned appurtenances

~~against all and every person and persons whomsoever~~

EXHIBIT B (3)

O.K. W.H. Nottingham
Asst Counsel

Approved
Charles J. Du Bot
General Solicitor

In testimony whereof, The said United States of America, through the United States Shipping Board, has caused its name to be hereunto subscribed by the Chairman of said Shipping Board and the seal of said Shipping Board to be hereunto affixed and attested by the Secretary of said Shipping Board

~~he hereunto set hand and seal~~ this 30th day of December, in the year of our Lord one thousand nine hundred and nineteen.

Signed, sealed, and delivered in presence of—

R. H. Baily Jr
W. B. Castonguay

U.S. S.B.

United States of America
By United States Shipping Board [SEAL.]
By W. L. Denman Chairman [SEAL.]
W. P. James acting asst. Secretary [SEAL.]

15-113

202B

District of Columbia, SS

I Hugh L Rickman a Notary Public in and for the District of Columbia, do hereby Certify that W. S. Benson who is Chairman of the United State Shipping Board, which said Shipping Board for and on behalf of the United State of America executed a certain Bill of Sale bearing date on the 20th day of April 1920 here annexed, personally appeared before me in said District of Columbia, the said W S Benson being personally well known to me as the Chairman of said Shipping Board which executed for and on behalf of the said United State of America the said bill of sale, and acknowledged to me that he executed the same as the Chairman of said Shipping Board, and that the same is the free and voluntary act and deed of said United State of America through the said United States Shipping Board and of himself as said Chairman for the uses and purposes therein expressed.

Given Under my hand and Seal the 20th day of April 1920.

NOTARIAL SEAL

Hugh L Rickman
Notary Public
My Commission expires May 24, 1924

EXHIBIT B (4)

[1] This acknowledgment may be made to conform to requirements of State laws.
[2] If the vendor is a corporation, write:

"....., who being duly sworn, deposed and said that he is the president, secretary, or other officer or agent [the acknowledgment of an instrument by a corporation must be made by some officer thereof authorized to execute it by the board of directors of the corporation. If the corporation has no seal, that fact must be stated in place of the statement respecting the seal], of the [name of corporation], the corporation which is described in and executed the within instrument, and that he knows the seal of the said corporation, and that it is affixed and was so affixed to the within instrument by order of the board of directors of the said corporation at whose order he signed his name and acknowledged the within instrument to be the free act and deed of the said corporation," or such other words as may be required by State laws.

Cat. No. 1340

DEPARTMENT OF COMMERCE
BUREAU OF NAVIGATION

BILL OF SALE
OF
REGISTERED VESSEL

TO

CALLED THE

Customhouse,

Received for record, ... 19..., ... M.

Recorded, book ..... page .....

Collector of Customs.

11—1340

PORT OF NEW YORK
COLLECTOR'S OFFICE

I HEREBY CERTIFY the within to be a true copy of the record of the Bill of Sale received, for record in this office, August 11th, 1920 at 12.00 M. and recorded in book R 171 page 6

GIVEN under my hand and the seal of the COLLECTOR, this 10th day of October 1924

Acting DEPUTY COLLECTOR

202C

PERMANENT
No. 172

OFFICIAL NO. 219134 | LETTERS K T K B

THE UNITED STATES OF AMERICA

DEPARTMENT OF COMMERCE

BUREAU OF NAVIGATION

Measured: New York, N.Y., 919

Rebuilt at , ,

Remeasured: , ,

DUPLICATE

Certificate of Registry

Radio call: K O K C

Service: Freight

Number of crew: 59

In Pursuance of Chapter One, Title XLVIII, "Regulation of Commerce and Navigation," Revised Statutes of the United States.

S. A. Webster, of New York, N. Y., Authorized Agent.

having taken and subscribed the oath required by law, and having sworn that

UNITED STATES OF AMERICA,

represented by

UNITED STATES SHIPPING BOARD,

is

the only owner

of the vessel called the "WATERBURY", of New York, N. Y.

whereof John E. Curtis is at present master, and is a citizen of the United States, and that

the said vessel was built in the year 1 919, at Arlington, N. Y. of steel

as appears by Certificate of Downey Shipbuilding Corporation, builder, on file in this office;

and W. Berryman, A. D. Surveyer having certified that the said vessel is a steamship

two decks, two masts, a plain head, and a round stem; that

her register length is 386.8 feet, her register breadth 52.2 feet, her register depth 27.4 feet,

her height feet; that she measures as follows:

						TONS	100ths
Capacity under tonnage deck						4459	30
Capacity between decks above tonnage deck							
Capacity of inclosures on the upper deck, viz: Forecastle 69.57	bridge 342.06	poop 95.63	break				
house-aft 123.09	chart 7.93	radio 5.14	excess hatchways 11.98	light and air 59.42		714	74
					Gross Tonnage	5174	13
Deductions under Section 4153, Revised Statutes, as amended							
Crew space 176.31	Master's cabin 18.09		B & W C 5.74				
Steering gear	Anchor gear 13.56		Boatswain's stores 17.98				
Chart house 7.93	Donkey engine and boiler		Radio house 5.14				
Storage of sails	Propelling power (actual space) 677.84		(32%) 1655.71				
					Total Deductions	1890	44
I. N. P. 2500					NET TONNAGE	3283	

The following-described spaces, and no others, have been omitted, viz: Forepeak used for water-ballast 31.50 aftpeak used for water-ballast 14.00, open forecastle 7.83, open bridge, open poop, open shelter-deck, anchor gear, steering gear 24.07, donkey engine and boiler, light and air 35.21, wheelhouse 7.07, galley 8.76, condenser, water-closets 14.28 Refrigerating machine 9.49

and the said JOHN E. CURTIS having agreed to the description and admeasurement above specified, according to law, said vessel has been duly registered at this Port.

GIVEN under my hand and seal, at the Port of NEW YORK, this 29TH day of NOVEMBER, in the year one thousand nine hundred and NINETEEN.

Place for Seal Naval Officer.

T. D. WILSON
Deputy Naval Officer.

Place for Seal Collector.

E. J. BONAHUE
A. Deputy Collector of Customs.

Eugene Tyler Chamberlain
Commissioner of Navigation

EXHIBIT C (Front)

203A

Office of Collector of Customs,

District of NEW YORK

Port of NEW YORK

I hereby certify the within to be a true copy of the original on record in this office.

Given under my hand and seal this TENTH

day of FEBRUARY 1920.

John Farrell

A. Deputy *Collector of Customs.*

No fee-official use.

EXHIBIT C (Back)

COPY.

DEPARTMENT OF COMMERCE

BUREAU OF NAVIGATION

PERMANENT

DUPLICATE

CERTIFICATE OF REGISTRY

No. 172

of the

steamship

named the

WAT-HUBBY

of

New York, N. Y.

5174 gross 3293 net

tonnage of the

Port of New York, N. Y.

November 25th 1919.

Collector of Customs.

203 B

First, to the payment of all expenses and charges, including the expenses of any sale, the expenses of any retaking, and any other expenses or advances made or incurred by the party of the second part in the protection of its rights hereunder and to the payment of any damages sustained by the party of the first part from the default or defaults of the party of the second part, and to providing adequate indemnity against liens claiming priority over this mortgage.

Second, to the payment pro rata of all said notes, whether due or not due, with interest without preference of one note over another, or of interest over principal;

Third, any surplus thereafter remaining shall belong and be returned to the party of the first part.

And it is hereby provided, that it shall be lawful for the said party of the first part, its successors and assigns, to retain possession of the property hereby mortgaged, and at its own expense to use and enjoy the same until said indebtedness shall become due, unless the said party of the first part shall be deemed to have committed any act of default as herein provided.

In witness Whereof, the said party of the first part, has caused its [fol. 200] corporate name to be subscribed and its corporate seal affixed by its proper officers this — day of ——, 1919.

—— ——, by —— ——.

Attest: —— ——, Secretary.

STATE OF ——,
County of ——, ss:

On the — day of ——, nineteen hundred and ——, before me came —— ——, to me known, who, being by me duly sworn, did depose and say that he resides in ——; that he is the — of ——, the corporation described in, and which executed, the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation; and that he signed his name thereto by like order.

—— ——, Notary Public. My commission expires —— —, ——.

[fol. 201] EXHIBIT B IN EVIDENCE

(Here follows exhibit, marked side folio pages 202, 202a, 202b, and 202c)

[fol. 203] EXHIBIT C IN EVIDENCE

(Here follows exhibit, marked side folio pages 203a and 203b)

[fol. 204] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MORSE DRY DOCK & REPAIR COMPANY, Libellant-Appellant,

against

S. S. "NORTHERN STAR," Her Engines, etc.; HARRY LUBER, Intervening Petitioner-Appellee

STIPULATION AS TO RECORD

It is hereby stipulated and agreed, that the foregoing is a true transcript of the motion papers, order, pleadings and testimony taken pursuant to an order of this Court entered September 29, 1924 in the above matter as agreed on by the parties for the purposes of this appeal.

Dated New York, November 17, 1924.

Gerson C. Young, Attorney for Appellant. Barber & Stetson, Attorneys for Appellee.

[fol. 205] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

Appeal from the United States District Court for the Eastern District of New York

Before Rogers, Hough and Manton, Circuit Judges

Libel filed by Morse Dry Dock & Repair Company, libellant, to enforce a maritime lien. Under the 56th Rule in Admiralty, Harry Luber was interpleaded. Decree dismissing the libel. Libellant appeals. Affirmed.

Barber & Stetson, Esqs., Proctors for Appellant.

Gerson C. Young, Esq., Proctor for Intervening Petitioner-Appellee.

OPINION

MANTON, Circuit Judge:

[fol. 206] The appellant filed this libel in rem to foreclose its maritime lien for repairs upon the steamship Northern Star. The appellee, Luber, was brought in under the 56th Rule in Admiralty for the reason that he claimed to be the owner, by assignment, of a mortgage on the vessel. The appellant is confronted with the claim that this is a preferred mortgage under the Ship Mortgage Act of 1920 (41 St. L. 1001).

The vessel was a former government owned ship and was sold to the American Star Line Inc., on August 9, 1920. The latter gave

the United States of America a preferred mortgage and ten promissory notes in amount of $1,217,437.50, covering the balance due on the purchase price. The bill of sale of the mortgage was recorded at the Custom House at the Port of New York on August 11, 1920. When so given, the Northern Star was at sea. Upon its return to an American port, a certified copy of the mortgage was placed on board the vessel and kept with the ship's papers continuously from September 23, 1920. But the Collector of Customs did not endorse the mortgage upon the ship's papers until June 27, 1921. The appellant, between November 14th and November 27th, 1920, at the request of the American Star Line Inc., furnished repairs to the steamship at the Port of New York in the amount for which this libel is filed. On Dec. 22, 1920, receivers were appointed for the American Star Line Inc., a New York corporation, because of defaults in this [fol. 207] agreement of sale and the preferred mortgage. On Aug. 4, 1923, the intervenor-appellee purchased the mortgage of the United States for $117,000. On August 2, 1923, the District Court entered an order permitting all persons claiming any interest in the Northern Star to file libels against the vessel and prosecute the same to the satisfaction thereof.

The questions presented to us are (1) whether the appellant has a maritime lien because of the work, labor and services performed in repairs to the vessel, and (2) whether the appellee Luber's preferred mortgage has a preferred status from August 11, 1920, the date of its recordation in the Custom House at the Port of New York, and whether it takes priority over the appellant's claim, assuming that the appellant has a lien. The work performed on the vessel was during a period of time when the owner was in possession of the vessel. The mortgage contained a clause that

"the American Star Line, Inc., covenants and agrees * * * Not to suffer nor permit to be continued any lien, encumbrance or charge which has or might have priority over this mortgage of the vessel to the party of the second part; * * *

"To carry a properly certified copy of this mortgage with the ship's papers; and to take such other appropriate steps as designated to it by the party of the second part from time to time or required by the circumstances, as will give notice to the world that the party of [fol. 208] the first part's right, title and interest in the vessel is subject to this mortgage, and that the party of the first part has no right, power nor authority to suffer or permit to be imposed on or against the vessel any liens or claims which might be deemed superior to or a charge against, the interest of the party of the second part in the vessel."

It will be observed from the foregoing provisions of the mortgage, that the owner covenanted not to permit a prior lien to the mortgage. The conveyance of the vessel to the American Star Line, Inc., was absolute and when the appellant finished its work pursuant to its employment by an authorized agent, it had a lien on the vessel pursuant to the terms of the Ship Mortgage Act of 1920 (Sub. Div. P, Q, R), but whether it ranks ahead of the mortgage of Luber depends upon

whether that mortgage is a preferred mortgage under the provisions of the Ship Mortgage Act. If that mortgage may not be deemed a preferred mortgage, then the appellant's lien is senior in rank. (The Buckhannon, 299 Fed., 519; The Culgoa, 299 Fed., 935; The Rupert City, 213 Fed., 263.) In The Buckhannon (supra), we said:

"She was a mortgaged vessel, but it is a point too familiar to need citation that the mere fact that there is a mortgage and not a preferred mortgage upon a ship, does not in the least prevent or limit the right of her owner, or that owner's lawful agents to pledge the [fol. 209] credit of the vessel by the incurring of a maritime lien is superior to the mortgage and takes no cognizance of the mortgage as such."

However, if the mortgage be a preferred one, the lien of the appellant is junior to that of the mortgage lien. The appellant attacks the validity of the mortgage as a preferred mortgage, contending that the failure to endorse it on the ship's papers before June 27, 1921, made it invalid prior thereto as such preferred status. It had been recorded in the Custom House on August 11, 1920, and a certified copy placed on the vessel on September 28, 1920. The failure to endorse the mortgage on the ship's papers was the failure of the Collector of the Custom. The Act provides for the endorsement of the mortgage on the ship's papers and Sub. Div. M provides that a lien arising prior in time to the recording and endorsement of a preferred mortgage, is a preferred maritime lien, but these provisions must be interpreted in the light of the whole statute. Sub. Div. D provides that such endorsement shall be made by the Collector of Customs at the port of documentation of the mortgaged vessel or upon request of the mortgagee by the Collector of Customs at the port where the vessel may be found. It will be noted that the duty is imposed upon the Collector of Customs. When a vessel is not at her home port, the Collector of Customs at that port cannot [fol. 210] make the endorsement on the papers and the endorsement apparently must be made in an American port. Therefore, such recordation may not be made on an American vessel which happens to be plying between foreign ports. But it evidently was the intention of the Ship Mortgage Act to protect the mortgagee even under such circumstances. That the Act places very strongly upon the Collector of Customs, the duty of making the endorsement, is indicated by Sub. Div. D which provides, "and no clearance shall be issued to the vessel until such indorsement is made." Sub. Div. J renders the Collector of Customs liable to persons entering into any contract on the credit of the vessel who have suffered any damage as a result of the Collector's failure to perform any duty required of him under the Act. These sections indicate that it was not intended by Congress to penalize a mortgagee for the failure of the Collector of Customs to perform his duty, but placed the responsibility on the Collector. Furthermore, liability of the mortgagor for any damage to third parties resulting from any failure on the mortgagor's part, is provided for, and no mention is made of liability on the part of the mortgagee. It was pointed out in The Egeria

(294 Fed. 791) that such endorsement of the mortgage was a matter with which the mortgagee had nothing to do; that it was the duty of the Collector of Customs to make the endorsement and the presumption would be, until the contrary was shown, that the Collector duly performed his duty and if there was a failure of allega-
[fol. 211] tion in this respect, the remedy was to except to the libel, for the defect was one which might have been cured by amendment. The mortgagee, in the nature of things, has no control over the mortgagor or the Collector of Customs, and the Act indicates that it is not contemplated that the mortgage be invalid by reason of the failure of indorsement by the Collector. It is the intention of the Ship Mortgage Act to protect the mortgagee, not to penalize him for the failure of a government official to comply with the provisions of the Act. All was done here that could be done by the recordation of the mortgage, the placing of it among the papers of the ship, and the delay of the Collector of Customs in making the endorsement, to some extent excused by reason of the fact that the vessel was on the high seas, will not invalidate this mortgage as a preferred mortgage. (The Nanking, 1923, A. M. C. 1191, Dis. Ct. No. Dist. of Calif.; The Oconee, 280 Fed. 927; The Owego, 292 Fed., 403.) The purpose of such an endorsement manifestly is to give notice to persons having dealings with the vessel that there is a preferred mortgage upon it. Such notice was amply given by the record of August 11, 1920, in the Custom House and filing a certified copy on board the vessel with its papers on September 23, 1920. Reasonable care and diligence, by way of investigation, would have given the appellant knowledge of the mortgage and its terms before the repairs were made in November, 1920. (United States vs. Carver,
[fol. 212] 260 U. S., 482; The Princess Matoika, 1924, A. M. C. 1033; The Moosabee, 1923, A. M. C. 874, C. C. A. 4th Circuit; The Susane, 2 (2") Fed., 410.)

We hold that the libellant has a maritime lien which attaches to the vessel but which is junior to the lien of the appellee Luber, and we hold that his mortgage is a preferred mortgage within the terms of the Act.

A decree will be entered in conformity with this opinion.

[fol. 213] In United States Circuit Court of Appeals

[Title omitted]

Appeal from the District Court of the United States for the Eastern District of New York

Judgment—Feb. 27, 1925

[fol. 214] This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered adjudged, and decreed that the said cause be and it hereby is remanded to the District Court with instructions to enter a decree in conformity with the opinion of this Court. Costs to the appellant.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

H. W. R. C. M. H.

[File endorsement omitted.]

[fol. 215] In United States Circuit Court of Appeals

Clerk's Certificate

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 162 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Morse Dry Dock & Repair Company, Libellant-Appellant, against Steamship Northern Star, her engines, etc., Appellee; Harry Luber, Intervening Petitioner-Appellee, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 9th day of March in the year of our Lord One Thousand Nine Hundred and twenty five, and of the Independence of the said United States the One Hundred and forty ninth.

Wm. Parkin, Clerk. (Seal of the United States Circuit Court of Appeals, Second Circuit.)

[fol. 216] Supreme Court of the United States

Order Allowing Certiorari—Filed April 20, 1925

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

In the Supreme Court of the United States.

No. [redacted]326

October Term, [redacted] 1925

MORSE DRY DOCK & REPAIR COMPANY,

Petitioner,

against

S. S. NORTHERN STAR, her engines, etc., and HARRY LUBER, Intervening Petitioner,

Respondents.

NOTICE OF MOTION, PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

Barber & Stetson, Esqs.,
Proctors for Petitioner,
Office & P. O. Address,
32 Broadway,
Borough of Manhattan,
City of New York.

Arthur H. Stetson,
Of Counsel.

In the Supreme Court of the United States.

MORSE DRY DOCK & REPAIR COMPANY, Petitioner, against S. S. NORTHERN STAR, her engines, etc., and HARRY LUBER, Intervening Petitioner, Respondents.	October Term, 1924. No.

SIR:

PLEASE TAKE NOTICE that the annexed petition for a writ of certiorari and attached brief will be presented to the Supreme Court of the United States on the fifth Monday of March, 1925.

Dated New York, N. Y., March 10, 1925.

Yours, etc.,

BARBER & STETSON, ESQS.,
Proctors for Petitioner,
Office & P. O. Address,
#32 Broadway,
Borough of Manhattan,
City of New York.

ARTHUR H. STETSON,
Of Counsel.

To:

GERSON C. YOUNG, ESQ.,
Proctor for Respondent, Harry Luber,
80 Maiden Lane,
New York City.

43937

SUPREME COURT OF THE
UNITED STATES.

MORSE DRY DOCK & REPAIR COMPANY, Petitioner, against S. S. NORTHERN STAR, her engines, etc., and HARRY LUBER, Intervening Petitioner, Respondents.	October Term, 1924. No.

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

The petition of the Morse Dry Dock & Repair Company respectfully shows:

This is an application for writ of certiorari to review a final decision of the Circuit Court of Appeals for the Second Circuit filed February 20, 1925, affirming in part and reversing in part a decree in admiralty of the District Court for the Eastern District of New York, dismissing libel filed to recover for repairs to the steamship "Northern Star."

Facts.

The petitioner, between November 14, 1920 and November 27, 1920, at the special instance and request of the American Star Line, Inc.,

then the owner of the steamship "Northern Star", ex "Waterbury," hereinafter called the steamship, performed certain work, labor and services and furnished certain supplies in making necessary repairs to said steamship of the agreed value of $1,705.87, no part of which has been paid.

The said American Star Line, Inc., was a New York Corporation and New York was the home port of the said steamship. On December 24, 1919, the United States of America, through the United States Shipping Board, transferred to the said American Star Line, Inc., the said steamship "Northern Star" then named the "Waterbury" by a document known as "Standard Form of Purchase Agreement." This agreement was never recorded.

On December 30, 1919, the United States of America, then the owner and holder of the legal title to the said steamship, acting by and through the United States Shipping Board, for a good and valuable consideration, duly executed and delivered to the said American Star Line, Inc., an absolute and unconditional bill of sale for said steamship, and on the same date the said American Star Line, Inc., being then the owner and holder of the legal title to the said steamship, for value received and to secure the payment of the balance of the purchase price of said vessel, executed, acknowledged and delivered to the United States of America purchase money mortgage in the sum of $1,217,437.50 covering the said steamship; and the said indebtedness was evidenced by ten (10) promissory notes totalling $1,217,437.50 executed by the said

American Star Line, Inc., and delivered to the United States of America, payment of which notes was secured by the aforesaid purchase money mortgage.

On August 11, 1920, the said bill of sale and said mortgage were received for record and recorded at the office of the Collector of Customs at the Custom House, in the port of New York. Neither the said bill of sale or mortgage contained any reference whatsoever to said "Purchase Agreement."

A certified copy of said mortgage was placed on board said vessel on September 23, 1920, and remained with the ship's papers and documents on said vessel at all times until some time subsequent to the making of the beforementioned repairs by the libelant herein.

Said steamship entered the port of New York, September 21, 1920 and cleared on September 22, 1920 and entered again some time before the said repairs were made in November, 1920, but no indorsement of the mortgage was made on the vessel's documents until the 27th day of June, 1921, when the aforesaid mortgage was indorsed on the documents of the said steamship by the Collector of Customs of the port of New York, as required by the provisions of Section 30 of the Act of June 5th, 1920, known and hereinafter referred to as the Ship Mortgage Act, 1920.

The said American Star Line, Inc., on the 30th day of December, 1920, defaulted in the payment of the interest and principal amount of the promissory note, which pursuant to the aforesaid mortgage, was due and payable on

the 30th day of December, 1920; and the right thereupon accrued to the United States of America, the then holder of the aforesaid mortgage on the said steamship to collect the entire indebtedness, payment of which was secured by the terms of said mortgage.

On the 4th day of August, 1923, the United States of America, represented by the United States Shipping Board, acting by and through the United States Shipping Board Emergency Fleet Corporation, for good and valuable consideration, duly assigned, transferred and set over, all its rights, title and interest in and delivered to the said Harry Luber, the respondent herein, the aforesaid mortgage and the promissory notes therein referred to, payment of which was secured thereby. The aforesaid assignment of said mortgage was duly recorded by the Collector of Customs at the Custom House in the port of New York on August 11, 1923, Book P. M. 9, Page 10.

The District Court in its opinion held, that the Petitioner did not and could not acquire a maritime lien against the steamship because of the prohibition contained in the said mortgage against creating liens (fols. 405-406 of record); that the said mortgage acquired a preferred status on August 11, 1920, the date it was recorded in the office of the Collector of Customs and that the provision of the Ship Mortgage Act, 1920, for indorsing the fact of the mortgage on the ship's papers is directory and not mandatory (fols. 420-421 of Record).

The Circuit Court of Appeals held, to quote from its opinion, as follows:

"We hold that the libellant has a maritime lien which attached to the vessel but which is junior to the lien of the appellee Luber, and we hold that his mortgage is a preferred mortgage within the terms of the Act."

Questions Involved.

The question and propositions of law involved in this case are substantially as follows:

1. WAS THE MORTGAGE OF THE UNITED STATES ON THE SAID STEAMSHIP NORTHERN STAR A PREFERRED MORTGAGE WITHIN THE MEANING OF THE SHIP MORTGAGE ACT, 1920, AT THE TIME THE CLAIM OF THE PETITIONER ACCRUED?

2. IS NOT THE MARITIME LIEN OF THE PETITIONER A PREFERRED MARITIME LIEN WITHIN THE MEANING OF SUBSECTION M. OF THE ACT?

1. Was the mortgage of the United States on the said Steamship Northern Star a preferred mortgage within the meaning of the Ship Mortgage Act, 1920, at the time the claim of the Petitioner accrued?

The provisions of the Ship Mortgage Act defining a preferred mortgage and indicating what formalities must be complied with to give the mortgage a preferred status are found in Subsection D of the Act which is as follows:

"Subsection D:

(a) A valid mortgage which, at the time it is made includes the whole of any vessel of the United States of 200 gross tons and upwards, shall in addition have, in respect to such vessel and as of the date of the compliance with all the provisions of this subdivision, the preferred status given by the provisions of subsection M, *if*—(Italics ours),

(1) The mortgage is indorsed upon the vessel's documents in accordance with the provisions of this section;

(2) The mortgage is recorded as provided in subsection C, together with the time and date when the mortgage is so indorsed;

(3) An affidavit is filed with the record of such mortgage to the effect that the mortgage is made in good faith and without any design to hinder, delay or defraud any existing or future creditor of the mortgagor or any lienor of the mortgaged vessel;

(4) The mortgage does not stipulate that the mortgagee waives the preferred status thereof; and

(5) The mortgagee is a citizen of the United States.

(b) Any mortgage which complies in respect to any vessel with the conditions enum-

erated in this subsection is hereafter in this section called a 'preferred mortgage' as to such vessel."

The foregoing extracts from the Ship Mortgage Act indicate the importance given to the word "Indorsement" as used therein and its significance and importance is further emphasized by the following subsections, reading as follows, (Italics ours)

"Subsection C: (5) (c)

There shall be *indorsed* upon the documents of a vessel covered by a preferred mortgage:

(1) The names of the mortgagor and mortgagee;

(2) The time and date the *indorsement* is made;

(3) The amount and date of the maturity of the mortgage; and

(4) Any amount required to be *indorsed* by the provisions of sub-division (e) or (f) of this sub-section.

(d) Such *indorsement* shall be made * * * *and no clearance shall be issued to the vessel until such indorsement is made.* The Collector of Customs at the Port of Documentation shall give such direction by wire

or letter at the request of the mortgagee, etc. Whenever any new document is issued for a vessel such *indorsement* should be transferred to and *indorsed* upon the new document by the Collector of Customs."

"Subsection F:

The Mortgagor * * * (2) without the consent of the mortgagee shall not incur, after the execution of such mortgage and before the mortgagee has had a reasonable time in which to record the mortgage and have *indorsements* in respect thereto made upon the documents of the vessels," etc.

"Subsection M, (a):

When used hereinafter in this section, the term 'Preferred Maritime Lien' means (1) a lien arising prior in time to the recording *and indorsement* of a preferred mortgage in acordance with the provisions of this section," etc.

"Subsection V:

The Secretary of Commerce is authorized and directed to furnish Collectors of Customs with all necessary books and records, and with certificates of registry and of enrollment and license, in such form as provides for the making of all *indorsements* thereupon required by this section."

"Subsection W:

The Secretary of Commerce is authorized to make such regulations in respect to the recording *and indorsing* of mortgages covering vessels of the United States, as he deems necessary to the efficient execution of the provisions of this section."

2. Is not the maritime lien of the Petitioner a preferred maritime lien within the meaning of Subsection M of the Act?

Subsection M.

(a) When used hereinafter in this section, the term 'preferred maritime lien' means (1) a lien arising prior in time to the recording and indorsement of a preferred mortgage in accordance with the provisions of this section; or (a) a lien for damages arising out of tort, for wages of a stevedore when employed directly by the owner, operator, master, ship's husband or agent of the vessel, for wages of the crew of the vessel, for general average, and for salvage, including contract salvage.

(b) Upon the sale of any mortgaged vessel by order of a district court of the United States in any suit in rem in admiralty for the enforcement of a preferred mortgage lien thereon, all pre-existing claims in the vessel, including any possessory common-law lien of which a lienor is deprived under the provisions of subsection L shall be held terminated and shall thereafter attach, in

like amount and in accordance with their respective priorities, to the proceeds of the sale; except that the preferred mortgage lien shall have priority over all claims against the vessel, except (1) preferred maritime liens, and (2) expenses and fees allowed and costs taxed by the court."

It is respectfully urged that the Circuit Court of Appeals erred in the conclusions which it reached on the two questions before stated and in holding, as it in effect did, that the word "indorsement" as used throughout the Ship Mortgage Act, 1920 is entitled to no consideration whatever in spite of the fact that the word was designedly used by Congress and the terms of the Act on this point clear and unambiguous.

Wherefore your Petitioner prays that this Honorable Court will be pleased to grant a writ of certiorari in this case to the Circuit Court of Appeals for the Second Circuit to bring up this case to this Honorable Court for such proceedings therein as to this Honorable Court may seem just.

MORSE DRY DOCK & REPAIR COMPANY,
By Edward P. Morse
Pgd

BARBER & STETSON, ESQS.,
Proctors for Petitioner,
Office & P. O. Address,
32 Broadway,
Borough of Manhattan,
City of New York.

ARTHUR H. STETSON,
Of Counsel.

Southern District of New York: ss.

EDWARD P. MORSE, being duly sworn, deposes and says:—

That I am an officer of the Morse Dry Dock & Repair Company, the petitioner herein, to wit, the treasurer thereof.

I have read the foregoing petition and know the contents thereof and the allegations therein contained are true to the best of my knowledge and belief.

Edward P Morse
EDWARD P. MORSE. Sgd

Sworn to before me this
13 day of March, 1925.

Margaret Ernst
Notary Public.

Notary Public Bronx Co. No. 37 Reg. No. .....
(Notarial Seal) Cert. filed in N. Y. Co. No. 192 Reg. No. 2[illegible]
Commission expires March 30th, 1926

We hereby certify that we have examined the foregoing petition and in our opinion it is well founded and entitled to favorable consideration by the Court.

Dated, New York, N. Y. March 13, 1925.

Barber & Stetson
Sgd
Proctors for Petitioner,
Office & P. O. Address,
32 Broadway,
Borough of Manhattan,
City of New York.

Archer H Stetson
Sgd
Of Counsel.

BRIEF IN SUPPORT OF MOTION.

SUPREME COURT OF THE
UNITED STATES.

MORSE DRY DOCK & REPAIR COMPANY, Petitioner, against SS "NORTHERN STAR" her engines, etc., and HARRY LUBER, INTERVENING PETITIONER, Respondents.	October Term, 1924. No.

POINT I.

The provision for indorsement of the mortgage on the vessel's documents is mandatory and must be complied with before the mortgage can have a preferred status.

There are two reported cases which deal with the effect of the failure to indorse the mortgage on the vessel's documents:

"*The Nanking*", 292 Fed., 641, decided by the District Court for the Northern District of California.

While this case deals with the question of the effect of failure of making indorsement on the

ship's papers, it is not in point with the question of indorsement as raised by the Petitioner in the instant case. There the fact of the mortgage was actually indorsed upon the ship's papers and the point involving the indorsement arises under subdivision (1) (c) (4) and (e) of subsection (d) of the Ship Mortgage Act, the purpose of which is to take care of a situation where property other than a vessel is included in a preferred mortgage.

The question, whether the failure to make any indorsement whatever of the fact of the mortgage upon the ship's documents, deprives the mortgage of its status as a preferred mortgage, as to parties who have rendered services to the vessel and upon the credit of the vessel, was not raised in any way in "The Nanking" case.

Even if the court there was referring to the indorsement of the existence of a mortgage, (which was, however, not in question) his language merely is that he would not hold the mortgage void for lack of indorsement. This does not mean that he would give it a preferred status had there been no indorsement whatever.

The Petitioner does not claim that the failure to indorse the mortgage on the vessel's documents renders the mortgage void in invalid but that such failure leaves the mortgage as an ordinary and not preferred mortgage.

"*The Northern Ware*", 298 Fed. 188, decided in the District Court, Eastern District of Pennsylvannia, April 9, 1924.

This case is authority for the proposition before set forth, that the provision for the in-

dorsement of the fact of the mortgage on the ship's documents is mandatory and not merely directory.

To quote from the opinion of the court, in this case:

> "The mortgage upon the 'Northern Wave' was dated as of October 22, 1920, but was executed, acknowledged and recorded in the Custom House at Baltimore, Maryland on November 30, 1920. A certificate of delivery of the vessel to the West Indian Navigation Co., Inc., as purchaser, on October 28, 1920 was executed November 10, 1920. The certificate of registry, issued by the Collector of Customs at Baltimore, Maryland is dated December 14, 1920. At the time of the furnishing of supplies and the rendering of services while the vessel was lying in the port of Philadelphia, for which liens are claimed, there was no indorsement upon the ship's documents required to make it a preferred mortgage under the Ship Mortgage Act of 1920, Section 30, subsection D, (Comp. St. Ann. Supp. 1923, Section 8146¼ kkk) and indorsement was not made until January 4, 1921. The Commissioner distinguished the case from 'The Cleo' case upon the ground that the vessel in that case was under charter, the person ordering supplies was not the owner, and the supply man was put upon inquiry.
>
> It is conceded, in the present case, that the lien claimants did not make any inquiry

concerning the authority of the owner to bind the vessel.

The mortgagee is protected by the Act of 1920 in making the mortgage a preferred one by having it indorsed upon the ship's papers. Under these circumstances, what would reasonable diligence have revealed by investigations? If the lien claimants had examined the ship's papers they would have shown that the West Indian Navigation Company was the owner of the vessel and that there was no indorsement upon the ship's papers of the mortgage under which claim is made.

Would reasonable diligence require the lien claimants, knowing that a mortgagee could obtain a preferred status for his mortgage and obtain protection against liens by having it indorsed upon the ship's papers, to do more than examine the ship's papers? Would reasonable diligence suggest lack of diligence on the part of the party more interested in protecting the vessel against lien? Would reasonable diligence require the lien claimants to have an examination made of the records at Baltimore to ascertain whether a mortgage was recorded there, and whether the owner had, by the terms of the mortgage, limited his authority to create liens? I think not. * * *"

Also "*The Bethlehem*", 286 Fed. 400.

The case of "*The Egeria*", 294 Fed. 791, cited and commented upon by the respondent, Luber, in his brief in the Circuit Court of Appeals and by that Court in its opinion is not applicable to

the questions raised in the instant case on the effect of the failure to indorse the fact of the mortgage on the vessel's documents. That case deals with the effect of the failure to allege the fact of indorsement in the pleadings in an action to foreclose a preferred mortgage. The question of the effect of the failure to make an indorsement as applying to the rights of a party who has acquired a maritime lien on the vessel prior to the making of the indorsement did not arise and was not considered.

Both the District Court and the Circuit Court of Appeals, in opinions rendered, discuss at some length the duty of the Collector of Customs and the responsibility of the mortgagee in the matter of making the indorsement, but it is submitted that whatever may be the conclusion reached on these points, it cannot effect the rights of the petitioner herein. Its rights must be determined by the application of the statute to certain established facts which are that the work of the petitioner was done in November, 1920; that the vessel involved actually entered the port of New York on September 21, 1920, and that no indorsement of the mortgage was made on the vessel's documents until June 27th, 1928.

It is difficult to believe, that Congress, after using the word "indorsement" on fifteen or more occasions in this Act, did not intend that it should carry some weight and be of some significance.

POINT II.

The martime lien of the petitioner has a preferred status under subsection M of the act and is superior to the mortgage herein even though that mortgage acquired a preferred status from August 11, 1920, the date it was recorded.

The definition of a preferred maritime lien, as contained in subsection M (a) and (b), which subsection is quoted in full in the foregoing petition, clearly indicates that it was the intention of Congress to give the preferred status to any maritime liens which might be created prior not only to the recording, but also to the indorsing of the mortgage. The expression "recording and indorsement", as used in this section, is conjunctive and the maritime lien of the petitioner having arisen before the making of the indorsement entitles it to have its claim classified as a preferred maritime lien within the meaning of the statute. If Congress had intended that the recording of a mortgage alone would be sufficient to prevent any maritime liens acquired thereafter becoming preferred maritime liens there would have been no occasion whatever for the use of the word "indorsement" in this connection.

Regardless of whether indorsement is mandatory to give a mortgage a preferred status, in any event subsection M expressly provides that the mortgage shall be subordinated to a lien arising under the conditions mentioned therein.

When Congress gave to the holders of mortgages on vessels of the United States a method by which they could obtain a preference for their mortgages over all claims, it also imposed upon them certain duties and obligations, the principal of which were the recording and indorsement of the mortgage.

It is not reasonable to ask of any Court in construing this Act that a mortgagee be held strictly to its requirements if he is to claim its benefits?

In conclusion, it is respectfully submitted that to eliminate from consideration and to give no effect whatever to the word "indorsement" as used in the Act, will not only deprive this Petitioner of substantial rights, but also will establish a dangerous precedent in the law affecting the construction of statutes.

This petition should be granted.

Dated New York, N. Y., March 10, 1925.

BARBER & STETSON,
Poctors for Petitioner.

ARTHUR H. STETSON,
Of Counsel.

United States Supreme Court
FILED
MAR 24 192
WM. R. STANSB
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In the Supreme Court of the United States.

No. 326.
October Term, 1925.

MORSE DRY DOCK & REPAIR COMPANY,
Petitioner,

vs.

S. S. NORTHERN STAR, her engines, etc.;
HARRY LUBER,
Intervening-Petitioner-Respondent.

BRIEF OF MORSE DRY DOCK & REPAIR COMPANY, PETITIONER.

Writ of Certiorari to the United States Circuit Court of Appeals, for the Second Circuit.

Barber & Stetson, Esqs.,
Proctors for Petitioner,
Office & P. O. Address,
32 Broadway,
Borough of Manhattan,
City of New York.

Arthur H. Stetson,
Of Counsel.

INDEX.

	PAGE
Preliminary Statement	1
Jurisdiction	3
Statement of Facts	9
Specifications of Error	14
Argument—Point I	15
Point II	29

Cases and Texts Cited.

American Construction Co. vs. Jacksonville Railway Company, 148 U. S. 372	7
Columbus Watch Co. vs. Robbins, 148 U. S. 266	7
Corona Company vs. United States, 263 U. S. 537	28
Fields vs. United States, 205 U. S. 292	5
Heitz vs. Ruppert, 218 N. Y. 148	37
Jerome H. Remick & Co. vs. American Automobile Accessories Company, 298 Fed. 628	29
Knickerbocker Trust Co. vs. Penn Cordage Company, 65 N. J. E. 181	25
Magnum Import Company vs. Coty, 262 U. S. 169	6
McMullen vs. Hoffman, 174 U. S. 639	6
Rice et al. vs. United States, 53 Fed. 910	37
Robertson, Commissioner of Patents vs. United States, 285 Fed. 911	28
Russell Motor Car Company vs. United States, 261 U. S. 514	27
St. Louis Iron Mountain & Southern Railway Company vs. Taylor Administratrix, 210 U. S. 281	28
Standard Oil Company vs. Anderson, 212 U. S. 215	7
The Anna E. Morse, 286 Fed. 797	34
The Bergen, 7 F. (2nd) 379	26
The Bethlehem, 4 F. (2nd) 308	18

PAGE

The Buckhannon, 299 Fed. 519 33
The Egeria, 294 Fed. 791 21
The Kensington, 183 U. S. 263 5
The Moshulu, 298 Fed. 348 21
The Nanking, 292 Fed. 642 21
The Northern Wave, 4 F. (2nd) 308 18
The Owego, 292 Fed. 403 21
The Oconee, 280 Fed. 927 21
The Three Friends, 166 U. S. 1 4
Workman vs. New York City, 179 U. S. 552 5

In the Supreme Court of the United States.

No. 326.
October Term, 1925.

Morse Dry Dock & Repair Company,
Petitioner,
vs.
S. S. Northern Star, her engines, etc., Harry Luber,
Intervening-Petitioner-Respondent.

BRIEF OF MORSE DRY DOCK & REPAIR COMPANY, PETITIONER.

Preliminary Statement.

This case is before this Court by reason of the allowance of a writ of certiorari for review of a judgment of the Circuit Court of Appeals for the Second Circuit.

The case originated in the United States District Court for the Eastern District of New York, and the opinion of that Court by Campbell, Judge, is reported in 295 Fed. 366 (R-60 to 66 inclusive). The opinion of the Circuit Court of Appeals, by Manton, Judge, is reported in 7 F. (2d) 505 (R. 94 to 97 inclusive).

The judgment sought to be reviewed was entered on February 27th, 1925 (R. 97-98).

The questions of law which this Court is asked to consider arise in connection with the construction and interpretation of certain provisions of Section 30, Ship Mortgage Act, 1920, 41 Stat. L. 1005, hereinafter referred to as Ship Mortgage Act 1920, and involve the right of the Petitioner herein to have the maritime lien on said steamship, to which the Circuit Court of Appeals held it was entitled, given priority over a certain mortgage on said steamship held by the said Respondent, Luber.

The Petitioner herein claims:

1. That the mortgage held by the said Intervening Petitioner, Luber, on said steamship was not, at the time its claim for repairs accrued, a preferred mortgage within the meaning of the Ship Mortgage Act 1920.

2. That the maritime lien acquired by it on said steamship is a preferred maritime lien within the meaning of subsection M, of the Ship Mortgage Act 1920.

The District Court, in its opinion, held that the Petitioner herein did not acquire a maritime lien against the steamship because of the prohibition contained in the mortgage against creating liens (R. 63-64); that the said mortgage acquired a preferred status on August 11, 1920, the date it was recorded in the office of the Collector of Customs and that the provision of the Ship Mortgage Act 1920 for indorsing the fact of the mortgage on the ship's papers is directory and not mandatory (R. 66).

The Circuit Court of Appeals reversed in part, and affirmed in part the decree entered upon the said opinion of the District Court and the following extract is quoted from its opinion.

> "We hold that the libelant has a maritime lien which attaches to the vessel, but which is junior

to the lien of the appellee, Luber, and we hold that his mortgage is a preferred mortgage within the terms of the Act" (R. 97).

Jurisdiction.

The jurisdiction of this Court is invoked under the following statutes:

"In any case, civil or criminal, in which the judgment or decree of the circuit court of appeals is made final by the provisions of this Title, it shall be competent for the Supreme Court to require, by certiorari or otherwise, upon the petition of any party thereto, any such case to be certified to the Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court" (36 Stat. L. 1157).

"The circuit court of appeals shall exercise appellate jurisdiction to review by appeal or writ of error final decisions in the District Courts, including the United States District Court for Hawaii and the United States District Court for Porto Rico, in all cases other than those in which appeals and writs of error may be taken direct to the Supreme Court, as provided in Section Two hundred thirty-eight, unless otherwise provided by law; and, except as provided in Sections Two hundred thirty-nine and Two hundred forty, the judgments and decrees of the circuit court of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different States; also in all cases aris-

ing under the patent laws, under the trade mark laws, under the copyright laws, under the revenue laws and under the criminal laws, and in admiralty cases'' (36 Stat. L., 1133 as amended by 38 Stat. L. 803).

Reference is made to the following cases as sustaining the jurisdiction of this Court.

The case of *''The Three Friends''*, 166 U. S. 1, was an action in admiralty involving the rights of the United States to seize the vessel for alleged violation of neutrality laws. The Court, in passing upon the sufficiency of grounds for certiorari, said in course of its opinion, at page 49:

> ''It is objected that the decree was not final, but, inasmuch as the libel was ordered to stand dismissed if not amended within ten days, the prosecution of the appeal, within that time, was an election to waive the right to amend and the decree of dismissal took effect immediately.
>
> In admiralty cases, among others enumerated, the decree of the Circuit Court of Appeals is made final in that court by the terms of section six of the Judiciary Act of March 3, 1891, but this court may require any such case, by certiorari or otherwise, to be certified 'for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court,' that is, as if it had been brought directly from the District or the Circuit Court, 26 Stat. 826, 828, c. 517, § 6.
>
> Accordingly the writ of certiorari may be issued in such cases to the Circuit Court of Appeals, pending action by that court, and, although this is a power not ordinarily to be exercised,

> American Construction Co. v. Jacksonville Railway, 148, U. S. 372, 385, we were of opinion that the circumstances justified the allowance of the writ in this instance, and the case is properly before us."

Certiorari was granted in the case of *The Kensington*, 183 U. S. 263. This was an action in admiralty in which it was sought to recover the value of passengers' baggage, which it was alleged the ship had wrongfully failed to deliver.

In the case of *Workman* vs. *New York City, Mayor, Alderman and Commonalty*, 179 U. S. 552, which was an action in admiralty. The District Court entered a decree in favor of the libelant against the City. The Circuit Court of Appeals for the *Second Circuit* to which the case was taken, affirmed in part and modified in part the decree of the District Court, and the case was then brought to the United States Supreme Court by the allowance of a writ of certiorari.

In the case of *Fields* vs. *United States*, 205, U. S. 292, Mr. Justice Brewer in commenting upon grounds necessary to sustain a certiorari proceeding, at page 296, said:

> "In this case there is no sufficient ground for a certiorari. The application comes within none of the conditions therefor declared in the decisions of this court.
>
> However important the case may be to the applicant, it is not one of gravity and general importance. There is no conflict between decisions of State and Federal courts or between those of Federal Courts of different circuits. There is nothing affecting the relations of this nation to foreign nations, and indeed, no matter of general interest to the public."

The following are a few of the instances where certiorari has been granted by this Court.

In the case of *McMullen* vs. *Hoffman* (1899), 174 U. S., 639, at page 644, the Supreme Court said:

> "* * * There is a difference of opinion in the courts below (in this case) as to the law applicable to the case. The question is one of importance, involving as it does the principles which should control in regard to the procurement of contracts at public lettings for work to be awarded to the lowest bidder. Assuming the same facts, the courts below have come to opposite conclusions upon the character of the contract, and upon the right of the complainant to obtain redress for his alleged wrongs.
>
> It was on account of the general importance of the question and the many lettings for public works by the government and by municipal corporations which are affected by the law relative to bidding, that this court thought it a proper case to issue the writ of certiorari herein. The cases upon the subject are not entirely harmonious, and we think it well to again consider some of them and, so far as possible to remove the doubts which seemingly have arisen in this branch of the law."

Magnum Import Company, Inc., v. *Coty*, 262 U. S., 169. Mr. Chief Justice Taft, at page 162, said:

> "Under Section 262 of the Judicial Code this Court is given power to issue all writs not specifically provided for by statute which may be necessary for the exercise of its jurisdiction, and agreeable to the usages and principles of law. Here the jurisdiction of this Court to grant the

application for certiorari already made and pending is conferred by Section 240 of the Judicial Code. That section provides that in any case, civil or criminal, in which the judgment or decree of the Circuit Court of Appeals is made final, it shall be competent for this Court, by certiorari upon the petition of a party thereto to bring the case here for review as if it had come by error or appeal. By Section 128 of the Judicial Code, as amended by the Act of January 28, 1915, c 22, Sec. 2, 38 Stat. 803, the judgment or decree of the Circuit Court of Appeals is made final in trade mark cases."

"The jurisdiction to bring up cases by certiorari from the Circuit Court of Appeals was given for two purposes, first, to secure uniformity of decisions between those courts in the nine circuits and, second, to bring up cases involving questions of importance which it is in the public interest to have decided by this Court of last resort."

Standard Oil Company v. *Anderson* (1909), 212 U. S., 215, the Court said:

"The case is here by certiorari from the Circuit Court of Appeals, which affirmed the judgment of the Circuit Court because of the supposed conflict of decision in the lower Federal Courts."

Columbus Watch Company vs. *Robbins,* 148 U. S., 266, conflict in judgments between different Circuit Courts of Appeals under same conditions.

American Construction Company vs. *Jacksonville Railway,* 148 U. S., 372, the Court said at page 383:

> "In the same spirit, the authority conferred on this court by the very provision on which the petitioners mainly rely, by which it is enacted that 'in any such case as is hereinbefore made final in the Circuit Court of Appeals, it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court,' has been held to be a branch of its jurisdiction which should be exercised sparingly and with great caution, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision."

In the instant case there exist many of the grounds held by this Court as sufficient for certiorari.

(a) It presents for consideration in the determination as to what constitutes a "preferred mortgage" and a "preferred maritime lien" within the meaning of that most important Act of Congress, the Ship Mortgage Act 1920, questions of gravity and importance.

(b) The final determination of these questions is of the utmost importance to the Government of the United States, to private ship owners and builders, to ship supply and repair men, to persons financing the building and operation of ships and indeed, to every interest involved in the marine industry not only in this but in foreign countries.

(c) There exists a conflict of decisions between Federal Courts of different circuits as to what constitutes a preferred mortgage within the meaning of the Act.

(d) To further indicate the importance of the questions involved and the extent of public interest therein, we believe it not improper to state that there are at the present time pending in the United States District Court, Eastern District of New York, eight cases and in the District Court of New Jersey, five cases and awaiting a decision in this case on questions raised herein.

Statement of Facts.

At the trial of this case in the District Court, the libelant, the Petitioner herein, and the Intervening Petitioner, the Respondent herein, entered into a stipulation covering certain of the material facts involved. The stipulation (R. 8, 9, 10) is short and for accuracy and convenience, we ask the Court's indulgence if we reproduce it in full.

> "For the purpose of the trial in this action, IT IS HEREBY STIPULATED AND AGREED by and between the proctors for the respective parties hereto, as follows:
>
> FIRST: That the libelant herein, Morse Dry Dock & Repair Company, during the period from November 14, 1920, to November 27, 1920, both dates inclusive, furnished to the steamship NORTHERN STAR, certain repairs, supplies and services as more fully appears from the bills annexed hereto marked Exhibit A, made a part hereof and hereby offered in evidence in behalf of the libelant the net charges as shown by said Exhibit A amounting, exclusive of interest, to the sum of $1,705.87, are fair and reasonable charges for the repairs, supplies and services so furnished; the said bills are offered in lieu of evi-

dence of the charges therein contained and not in any way as an admission on the part of Harry Luber, intervening petitioner and libelant herein that the repairs, supplies and services aforesaid, were furnished on the credit of the said steamship.

SECOND: That on or about the 9th day of August, 1920, the American Star Line, Inc., the owner and holder of the legal title to the said Steamship Northern Star, for value received and to secure the payment of the balance of the purchase price to the said vessel, executed and acknowledged and delivered to the United States of America a purchase money mortgage in the sum of $1,217,437.50 covering the said Steamship Northern Star; that the said indebtedness was evidenced by ten promissory notes totalling $1,217,437.50 executed by the American Star Line, Inc., and delivered to the United States of America payment of which notes was secured by the aforesaid purchase money mortgage; a true and correct copy of the aforesaid mortgage is annexed hereto, marked Exhibit B, made a part hereof and hereby offered in evidence with the same force and effect as if it were the original thereof.

THIRD: That on the 11th day of August, 1920, there was received for record in the office of the Collector of Customs at the Custom House in the Port of New York a bill of sale for the Steamship Northern Star by which the United States of America through the United States Shipping Board conveyed title to the aforesaid steamer to the American Star Line, Inc.; that on the same day, namely, August 11, 1920, and at approximately the same hour of that day, there was re-

ceived for record at the aforesaid office of the Collector of Customs, at the Custom House, in the Port of New York, a purchase money mortgage on the steamship Northern Star in the sum of $1,217,437.50 from the American Star Line, Inc., to the United States of America; the aforesaid bill of sale was recorded on August 11, 1920, in Book R. 171, No. 6, and the aforesaid mortgage was recorded in Book P. M. 1, page 58.

FOURTH: That on the 27th day of June, 1921, the record of the aforesaid mortgage was endorsed on the documents of the Steamship Northern Star by the Collector of the Port of New York as required by the provisions of Section 30 of the Act of June 5, 1920, known as the 'Ship Mortgage Act, 1920'.

FIFTH: That the American Star Line, Inc. on the 30th day of December, 1920, defaulted in the payment of the interest and principal amount of the promissory note which pursuant to the aforesaid mortgage was due and payable on the 30th day of December, 1920; that the right thereupon accrued to the United States of America, the then holder of the aforesaid mortgage on the said vessel, to collect the entire indebtedness, the payment of which was secured by the terms of the said mortgage.

SIXTH: That on the 4th day of August, 1923, the United States of America, represented by the United States Shipping Board, acting by and through the United States Shipping Board Emergency Fleet Corporation, for good and valuable consideration, duly assigned, transferred and set over all the right, title and interest in and de-

livered unto Harry Luber, intervening petitioner and libelant herein, the aforesaid mortgage and the promissory notes therein referred to, payment whereof was secured thereby; the aforesaid assignment of said mortgage was duly recorded by the Collector of Customs, at the Custom House in the Port of New York on August 11, 1923, in Book P. M. 9, page 10; the aforesaid assignment of mortgage is hereto annexed and marked Exhibit C, made a part hereof and hereby offered in evidence.

SEVENTH: IT IS HEREBY FURTHER STIPULATED AND AGREED, that the libel herein may be and hereby is amended so as to change the date of November 17, 1920, set forth in Article Fourth thereof, to November 27, 1920; that it be further amended so as to include an allegation in paragraph third thereof to the effect that the Steamship Northern Star on the date of the verification of the libel, was in the custody of the United States District Court for the Eastern District of New York.

EIGHTH: IT IS HEREBY FURTHER STIPULATED AND AGREED, that the intervening petition and the answer to the libel herein may be and hereby are amended so as to include the further separate defense in the answer and the further allegation in the intervening petition, as follows:

'That by the terms of the aforesaid mortgage on the Steamship Northern Star given by the American Star Line, Inc., to the United States of America, the creation of any maritime liens upon the Steamship Northern Star

of any liens which would rank prior to the lien of the mortgagee was prohibited and that the libelant herein cannot have any lien on said vessel for the repairs, supplies and services alleged in the libel.'

NINTH: IT IS HEREBY FURTHER STIPULATED AND AGREED that the answer of the libelant Morse Dry Dock & Repair Company herein to the said intervening petition be and it hereby is amended by adding thereto an allegation denying the matters set forth in the preceding paragraph hereof.''

Dated, New York, November 12th, 1923.

In addition to the foregoing facts, the evidence showed and the District Court found certain facts (which were upheld by the Circuit Court) as follows:

That the said repairs, services and supplies were furnished at the special instance and request of Mr. Garmey, consulting engineer, who was retained by the American Star Line, Inc., then the owner of said steamship Northern Star (R. 61).

That a certified copy of said mortgage was placed on board said steamship on September 23, 1920, and remained with the ship's papers and documents on said steamship at all times until some time subsequent to the making of the beforementioned repairs (R. 61).

That said steamship entered the port of New York on September 21, 1920, and cleared on September 22, 1920, and entered again some time before said repairs were made (R. 61).

While this case was pending in the Circuit Court of Appeals, the said intervening petitioner, appellee, over the objection of the said libelant, appellant, was allowed to take new evidence in form of a certain agree-

ment of sale of said steamship from the United States of America to the said American Star Line, Inc. This agreement was dated December 24, 1919, and is set forth in full in the Record, pages 81 and 93 inclusive. It was never recorded.

There was introduced in evidence by the said libelant-appellant, a bill of sale of said steamship from the United States of America to the said American Star Line, Inc., given in pursuance of said agreement which was dated and signed on December 30, 1919, acknowledged on April 20, 1920, and recorded in the office of the Collector of Customs for the Port of New York on August 11, 1920. The bill of sale is set forth in full in the record immediately following page 92.

Specifications of Error.

1. The Court erred in holding that the mortgage on said steamship held by the said intervening petitioner, appellee, Luber, was a preferred mortgage within the meaning of the Ship Mortgage Act, 1920, at the time the claim of the said libelant-appellant, Morse Dry Dock and Repair Company accrued (R. 97).

2. The Court erred in failing to find that the provisions of the Ship Mortgage Act, 1920, for indorsing the fact of the mortgage on the ship's papers was mandatory and that such indorsement was necessary to give the mortgage a preferred status.

3. The Court erred in failing to find that the said libelant-appellant, had a preferred maritime lien on said steamship within the meaning of subsection M of the Ship Mortgage Act, 1920.

4. The Court erred in holding that the maritime lien of the libelant-appellant was junior to that of the intervening petitioner, appellee, Luber (R. 97).

ARGUMENT.

POINT I.

In order that a mortgage should have a preferred status within the meaning of the "Ship Mortgage Act of 1920" the provisions of the act relative to the indorsement of the mortgage on the vessel's documents must be fully complied with. This provision is mandatory.

The following provisions of the act are pertinent:

"Subsection D:

(a) A valid mortgage which, at the time it is made includes the whole of any vessel of the United States of 200 gross tons and upwards, shall in addition have, in respect to such vessel and *as of the date of the compliance with all the provisions* of this sub-division, the preferred status given by the provisions of sub-section M, *if*

(1) The mortgage *is indorsed* upon the vessel's documents in accordance with the provisions of this section;

(2) The mortgage is recorded as provided in sub-section C, together with the time and date when the mortgage is so indorsed;

Note: Italics throughout the brief are ours, unless otherwise stated.

(3) An affidavit is filed with the record of such mortgage to the effect that the mortgage is made in good faith and without any design to hinder, delay, or defraud any existing or future creditor to the mortgagor or any lienor of the mortgaged vessel;

(4) The mortgage does not stipulate that the mortgagee waives the preferred status thereof; and

(5) The mortgagee is a citizen of the United States.

(b) Any mortgage *which complies in respect to any vessel with the conditions enumerated in this subsection* is hereafter in this section called 'preferred mortgage' as to such vessel.

(c) There shall be *indorsed* upon the documents of a vessel covered by a preferred mortgage—

(1) The names of the mortgagor and the mortgagee;

(2) The time and date the indorsement is made;

(3) The amount and date of maturity of the mortgage; and

(4) Any amount required to be indorsed by the provisions of subdivision (e) or (f) of this subsection.

(d) Such indorsement shall be made (1), by the collector of customs of any port of documenta-

> tion of the mortgaged vessel, or (2), by the collector of customs of the port in which the vessel, is found, if such collector is directed to make the indorsement by the collector of customs of the port of documentation; and no clearance shall be issued to the vessel until such indorsement is made. The collector of customs of the port of documentation shall give such direction by wire or letter at the request of the mortgagee and upon the tender of the cost of communication of such direction. Whenever any new document is issued for the vessel, such indorsement shall be transferred to and indorsed upon the new document by the collector of customs."

It must be kept in mind in construing the provisions of the Ship Mortgage Act, that it effected a decided change in the law with respect to the rights of repair companies and mortgagees of vessels. A reading of the report of the hearings before the House Committee on Merchant Marine and Fisheries, House Report No. 8442, 66th Congress, First and Second Sessions 1919-1920, cannot but establish the conviction that in giving to a mortgagee the opportunity to have his mortgage classified as a "Preferred Mortgage" it was in the minds of the enactors of the law to impose certain obligations and to say that these obligations are directory merely is clearly unwarranted. The Law must be applied as its stands. If its provisions are unreasonable or unnecessary the remedy rests with Congress. To modify it is beyond the power of any Court.

The Act clearly defines a preferred mortgage. To give to the mortgagee the benefit of a "preferred mortgage" the mortgagee must show that he has complied with all the provisions of the Act in this respect—the burden is upon him to do this.

It is difficult to conceive how Congress could have more clearly expressed its intention of making indorsement of the mortgage a mandatory provision than it did in Subsection D, paragraph (a) when it says: "A valid mortgage * * * shall in addition have in respect to such vessel *and as of the date of compliance* with all the provisions of this subsection", etc. There is no uncertainty or ambiguity in the words giving this unusual right and privilege.

That we are unable to cite in support of our contention any cases exactly in point is not strange when we consider that we are dealing with a statute, the requirements of which are so clear that any argument attempting to explain it is superfluous.

The case most nearly in point and which sustains the contention of the Petitioner on this point is *"The Northern Wave"*, 4 F. (2nd) 308. In this case and a similar case, *"The Bethlehem"*, 4 F. (2nd) 308, decided March 4, 1925, by the Circuit Court of Appeals, Third Circuit, certain libelants sought to recover the value of repairs furnished to these ships between the date of their delivery to the purchasers, the West Indian Navigation Company, which had given a purchase money mortgage to the United States Shipping Board, the seller, and the date of the indorsement of the mortgages on the ship's papers.

On the question of indorsement of the mortgage on the ship's documents, the Court, in its opinion at page 311 said:

> "Even if during the period before or at the time the supplies were delivered and the repairs made, the libellants had prosecuted an investigation and had come across the ship's papers somewhere, they would not have found endorsements of the mortgages on them, *for this essential act* was not performed until January 14, 1921, which

was after the libellants had begun and in some instances had completed furnishing supplies and making repairs. So, it was not until that date that the libellants could have found the provision in the mortgages against the owner incurring liens upon the ships, unless, indeed, without any suggestion from any available source the law required them to go to Baltimore, their home port, and search the ship's titles. We do not believe the statute, in demanding of the furnisher 'the exercise of reasonable diligence' in ascertaining the owner's authority to bind the ship, intends by the word 'reasonable' that the furnisher shall in every instance make an investigation complete in all details even to visiting the home port and searching the title of the ship. We are led to this conclusion because otherwise the Act of 1910, the forerunner of the Act of 1920, which was enacted to relieve furnishers from the rigor of the law as it then existed, as well as to facilitate navigation, would be ineffective and purposeless. We are therefore, of opinion that if the libellants in these cases had with reasonable diligence made the investigation which the law required of them, they would have discovered nothing that would have withdrawn from them the presumption of the owner's authority given by a preceding section of the Act."

The Respondent in brief, filed in this court in opposition to the petition for writ of certiorari, undertakes to differentiate between these cases and the case at bar with the statement "As a matter of fact, these cases did not in any way pass upon the preferred status of a mortgage, but the principal question involved in them was the libelant's right to any maritime lien" (Brief 13-14).

It is submitted that this statement is not correct as the court plainly indicated that in its opinion the mortgage was not entitled to a preferred status when it said in that part of the opinion above quoted, when referring to the indorsement of the mortgage on the ship's documents, "for this essential act was not performed until January 14th, 1921, which was after the libelants had begun and in some instances had completed furnishing supplies and making repairs."

Again the Respondent, in the same brief (pages 14-15) undertakes to give the same importance to the provision for carrying copies of the mortgages on the ship as that of indorsing the mortgages on the ship's documents.

The provision for the carrying of a copy of the mortgage is found in subsection E, which, for convenience, is quoted herewith:

> "Subsection E. The collector of customs, upon the recording of a preferred mortgage, shall deliver two certified copies thereof to the mortgagor who shall place, and use due diligence to retain, one copy on board the mortgaged vessel and cause such copy and the documents of the vessel to be exhibited by the master to any person having business with the vessel, which may give rise to a maritime lien upon the vessel or to the sale, conveyance, or mortgage thereof. The master of the vessel shall, upon the request of any such person, exhibit to him the documents of the vessel and the copy of any preferred mortgage of the vessel placed on board thereof."

This provision is directory merely and has to do with the handling of the mortgage after it has been recorded.

The provisions for indorsement, *supra*, are mandatory

and the strict compliance with their requirements constitute a condition precedent to giving the mortgage the classification of a "preferred" mortgage within the meaning of the Act.

In support of this contention that the provisions of the Ship Mortgage Act, 1920, as to indorsement are directory and not mandatory, the Respondent apparently relies strongly on the following enumerated cases and we beg leave to submit our comments thereon.

"The Nanking", 292 Fed. 642; *"The Egeria"*, 294 Fed. 791; *"The Oconee"*, 280 Fed. 927; *"The Owego"*, 292 Fed. 403; *"The Moshulu"*, 298 Fed. 348.

The Nanking case, while it deals with the question of the effect of failure of making indorsement on the ship's papers, it is not in point with the question of indorsement as raised by the Petitioner in the instant case. There the fact of the mortgage was actually indorsed upon the ship's papers and the point involving the indorsement arises under subdivision (1) (c) (4) and (e) of subsection (d) of the Ship Mortgage Act, the purpose of which is to take care of a situation where property other than a vessel is included in a preferred mortgage.

The question, whether the failure to make any indorsement whatever of the fact of the mortgage upon the ship's documents, deprives the mortgage of its status as a preferred mortgage, as to parties who have rendered services to the vessel and upon the credit of the vessel, was not raised in any way in the Nanking case.

Even if the court there was referring to the indorsement of the existence of a mortgage (which was, however, not in question), his language merely is that he would not hold the mortgage void for lack of indorsement. This does not mean he would give it a preferred status had there been no indorsement whatever.

The Petitioner does not claim that the failure to indorse the mortgage on the vessel's documents renders the mortgage void or invalid, but that such failure leaves the mortgage as an *ordinary* and not preferred mortgage.

The case of "The Egeria" is not applicable to the questions raised in the instant case on the effect of the failure to indorse the fact of the mortgage on the vessel's documents. That case deals with the effect of the failure to allege the fact of indorsement in the pleadings in an action to foreclose a preferred mortgage. The question of the effect of the failure to make an indorsement as applying to the rights of a party who has acquired a maritime lien on the vessel prior to the making of the indorsement did not arise and was not considered.

"The Oconee" case, when carefully read, will be found to uphold the Petitioner's contention that the indorsement of the mortgage is essential and constitutes a *condition precedent* to giving the mortgage a preferred status.

The Court at page 929 says:

> "The Ship Mortgage Act is a part of the Merchant Marine Act of June 5, 1920, 41, Stat. 1000. In order to provide an American merchant marine 'sufficient to carry the greater portion of its commerce and serve as a naval or military auxiliary in the time of war', and in order to encourage investment in ships and the financing of maritime ventures, Congress, in subsection C (a) of the act mentioned, provided a method whereby a mortgage on a vessel of the United States should have a preferred status. Certain *prerequisites* are provided in the act to be done by the mortgagor or the mortgagee, or both,

in order that the benefits of the provision may accrue—for instance: The vessel must be a vessel of the United States of 200 gross tons or upward; the mortgage must include the whole of the vessel; *the mortgage must be indorsed upon the vessel's documents;* it must be recorded as required, together with the time and date when the mortgage is so indorsed; an affidavit of good faith must be filed with the record; there must be no waiver therein of the preferred status, and the mortgagee must not be an alien. In the case now under consideration it is conceded that all of the *requirements* just named *were duly complied with.*

In addition to the above, certain *duties* are imposed by the act upon the mortgagor and master, and penalties are provided for their neglect. Thus, in section F, the mortgagor is required to retain a certified copy of the mortgage on board, 'to be exhibited by the master to any person having business with the vessel which may give rise to a maritime lien,' *etc.*, and the master of the vessel is required, 'upon the request of any such person', to exhibit, with the documents of the vessel, a copy of the mortgage to such person."

The preferred status of the mortgage was attacked in the Oconee case for the failure to comply with the provisions of subsection F above referred to and on this point the Court at page 934 said:

"By the terms of the act a preferred status attaches *as of the date of compliance with subdivision (a) of subsection D.* The compliance with these provisions, as has been heretofore stated, is admitted, and the statute itself nowhere

> seems to contemplate any default on the part of the mortgagee for the failure of compliance with those sections of the act *to be performed by the mortgagor and the master.* The mortgagor (the owner) is subjected to a penalty if he fails to deliver on board the ship a copy of the mortgage. The master is likewise subject to a penalty if he fails to exhibit the same when called upon. The mortgagee, in the nature of things, has no control over either, and the act clearly does not contemplate the invalidity of the mortgage by reason of such failure on their part."

It will be noted that the Court, while relieving the mortgagee from responsibility for failure to enforce the provisions of subsection E for keeping a copy of the mortgage on board the vessel and exhibiting the same, does not expressly or impliedly undertake to excuse the failure to have the mortgage indorsed, in fact it holds this act to be a "prerequisite" to obtaining the benefits of having its mortgage given a preferred status and indicates clearly, as we have before argued, that there is a clear distinction in importance between the requirement of indorsement and that of keeping the mortgage on board, etc.

In the Owego case the following paragraph is quoted from the opinion of the Court (page 405):

> "Prior to the enactment of the Ship Mortgage Act (Act June 5, 1920 [41 Stat. 1000]), ships were about as available for credit for general purposes as the snows of last December. The object of that statute was to enable the owners of vessels to use the vast capital invested in them with at least a part of the facility enjoyed by investors in structures on land. To that end the statute is remedial and should be liberally

> construed, *although all of its provisions as to registry and indorsement on the ship's papers should be complied with.* The commissioner's finding as to the validity of this mortgage is correct and the New York Trust Company is entitled to be paid out of the remnants."

In the Moshulu case, the Court in its opinion clearly indicates that the provision for the indorsement of the mortgage had been complied with, prior to the time when the claims of the libelants accrued.

As further indicating the importance which Congress placed upon the making of indorsement, we have only to refer to paragraph 2 of subsection D of the Act which provides that the mortgage shall be indorsed *before* it is recorded. This paragraph reads as follows:

> "The mortgage is recorded as provided in subsection C, together with the time and date when the mortgage is so indorsed."

It might be remarked here, that it is beside the point to argue whose duty it was to see that the necessary indorsement was made on the ship's documents in accordance with the provisions of the Act. It certainly was not the duty of the Petitioner and cannot effect its status.

In the case of the *Knickerbocker Trust Company* vs. *Penn Cordage Company,* 65 N. J. E. 181, through error in the Clerk's Office, a chattel mortgage was recorded in the real property records and the court, in holding that there was a failure to record the mortgage within the meaning of the statute, said at page 193:

> "It seems to me, however, that it is not necessary to decide these questions as to whose fault it was that the mortgage was not recorded

in the chattel mortgage book. The statute, in my opinion, required that the chattel mortgage in cases where no possession is taken of the goods mortgaged, must, in order to be valid against the creditors of the mortgagor, be actually recorded in a book directed by the statute to be provided. If it be not so recorded, the chattel mortgage is void as to such creditors no matter what may have occasioned the omission to record it as required by statute."

The provision for recording the mortgage which shares in importance that of indorsing the same on the ship's papers has been construed in the case of "*The Bergen*", 7 F (2nd) 379, and the language of the District Court, S. D. California, on this point is as follows:

"(1) I find that *the prerequisites under subdivision C, D, M and other* provisions of the Ship Mortgage Act of 1920 (41 Stat. at Large, 1000, §30 Comp. St. Ann. Supp. 1923 §§ 8146¼jjj-8146¼rr), were not complied with in the Joseph mortgage. An essential to priority and preference is that the mortgage be recorded in the office of the collector of customs of the port of documentation. This was not done in the instant case. The Joseph mortgage was recorded in the office of the collector of customs of the port of Los Angeles, Cal., on May 2, 1922, but the ship at that time, and at all times until June 28, 1922, was enrolled and documented in the port of San Francisco, Cal., which at all of said times until June 28, 1922, was the home port of said vessel. The recording of the mortgage in the office of the collector of customs of the port of Los Angeles, Cal., on May 2, 1922, was ineffectual and inoperative to constitute the mort-

> gage a preferred mortgage under the Ship Mortgage Act of 1920. For these reasons the Joseph mortgage cannot be classified as a preferred mortgage and the lien thereof upon the steamship Bergen does not fall in the category of a preferred maritime lien on the vessel as against other valid maritime liens of the libelant and certain interveners."

It is worthy of note that the mortgage here under consideration was dated and signed on December 30th, 1919, when there was no such an instrument as a "preferred mortgage" recognized by law. The Ship Mortgage Act of 1920 creating the "preferred mortgage" did not become a law until June 5th, 1920. Perhaps this fact may account for the failure of the parties interested to comply with the requirements of the Act necessary to give it a preferred status.

We feel that any extended argument upon the construction of the provisions of the Ship Mortgage Act 1920 before stated, defining a preferred mortgage, is unnecessary inasmuch as there is nothing obscure, doubtful or ambiguous in the meaning or application of the words used. This position has been taken by this Court in numerous cases.

Russell Motor Car Company vs. *United States*, 261 U. S. 514. Mr. Justice Sutherland said at page 519:

> "Rules of Statutory construction are to be invoked as aids to the ascertainment of the meaning or application or words otherwise obscure or doubtful. They have no place, as this Court has many times held, except in the domain of ambiguity. *Hamilton* vs. *Rathbone*, 175 U. S. 414, 421; *United States* vs. *Barnes*, 222 U. S.

> 513, 518-519; they may not be used to create but only to remove doubt."

Corona Company vs. *United States,* 263 U. S. 537, Mr. Justice Sutherland at page 540 said in commenting on Section 154 of Judicial Code:

> "But the words of the Statute are plain, with nothing in the context to make their meaning doubtful; no room is left for construction and we are not at liberty to add an exception in order to remove apparent hardship in particular cases."

St. Louis Iron Mountain and Southern Railway Company vs. *Taylor, Administratrix,* 210 U. S. 281, at page 295 this Court said by Justice Moody:

> "It is urged that this is a harsh construction. To this we reply that, if it be the true construction, its harshness is no concern of the Courts. They have no responsibility for the justice or wisdom of legislation and no duty except to enforce the law as it is written, unless it is clearly beyond the constitutional power of the law making body."

In the case of *Robertson,* Commissioner of Patents, *et al.,* vs. *United States ex rel.* Baff. 285 Fed. 911, the Court in its opinion at page 915 said:

> "Unless the language of a statute is vague, dubious, uncertain, indefinite, or ambiguous, or conveys a meaning that is absurd, or in contradiction of other parts of the enactment, or in contravention of the legislative purpose made evident by the enactment itself, there is no room for construction, and the meaning of the terms

actually employed in drafting a law must be accepted as manifesting the legislative intent."

In the case of *Jerome H. Remick & Co.* v. *American Automobile Accessories Co.*, 298 Fed. 628, the Court in the course of its opinion, at page 630, said:

> "And in determining this intent of Congress, as expressed in the act, it is the duty of the courts to read the enactment 'according to the natural import of the words used,' and, if the language used by Congress is unambiguous, there is no room for construction, nor can we speculate as to what Congress might have done, or might have intended, had the matter been specifically brought to its attention. As expressed by Mr. Sutherland in his work on Statutory Construction, 'there can be no intent of a statute not expressed in its words.' 2 Lewis' Sutherland, Statutory Construction (2nd Ed.) 745. See also *Treat* v. *White*, 181 U. S. 264, 267, 21 Sup. Ct., 611, 45 L. Ed. 853; *Dewey* v. *United States*, 178 U. S. 510, 521, 20 Sup. Ct. 981, 44 L. Ed. 1170."

POINT II.

The lien of the libelant arose prior in time to the indorsement of the fact of the mortgage on the ship's documents and is therefore a preferred maritime lien within the meaning of subsection M of the Ship Mortgage Act 1920.

The Petitioner has a maritime lien on the vessel.

As before stated, the repairs in question were furnished by the Petitioner at the special instance and request of Mr. Garmey, consulting engineer, who was

retained by the American Star Line, Inc., the owner of said vessel "Northern Star", and we feel that there is little need for any extended argument to sustain the finding of the Circuit Court of Appeals that the Petitioner has a maritime lien (R. 97). However, in view of the very extended argument by counsel for the Respondent in the courts below and the finding of the District Court on this point it seems advisable to comment briefly thereon.

The law in force at the time of furnishing the aforesaid repairs, etc., by the Petitioner, providing for maritime liens for necessaries, is found in subsections P, Q and R of the ship Mortgage Act, 1920, 41 Stat. L. 1005, which reads as follows:

> "Subsection P. Any person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit in rem, and it shall not be necessary to allege or prove that credit was given to the vessel.
>
> Subsection Q. The following persons shall be presumed to have authority from the owner to procure repairs, supplies, towage, use of dry dock or marine railway, and other necessaries for the vessel: The managing owner, ship's husband, master or any person to whom the management of the vessel at the port of supply is intrusted. No person tortiously or unlawfully in possession or charge of a vessel shall have authority to bind the vessel.
>
> Subsection R. The officers and agents of a vessel specified in subsection Q shall be taken to

> include such officers and agents when appointed by a charterer, by an owner *pro hac vice*, or by an agreed purchaser in possession of the vessel, but nothing in this section shall be construed to confer a lien when the furnisher knew, or by exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, agreement for sale of the vessel, or for any other reason, the person ordering the repairs, supplies or other necessaries was without authority to bind the vessel therefor."

The crux of the opinion of the Court below on this point is found in the following paragraph (R. 63):

> "The terms of subsection R seem to me to clearly show the intention to include the owner of the vessel among those who, by their own agreements may be prohibited from binding the vessel, because it says, 'nothing in this section shall be construed to confer a lien', which shows plainly that the prohibition referred to is not limited to any class named therein, or in any particular subsection, but it is to be construed, in connection with the whole of section 30, including of course subsections P and Q."

Upon reference to subsection P, it will be noted that the section applies to any person furnishing repairs, etc., to any vessel upon the order of the owner, etc.

Subsection Q provides for the persons who shall be presumed to have authority from the owner.

Subsection R refers to officers and agents of the vessel specified in subsection Q.

All of these sections clearly refer one to the other, and must be read together. If read together under the doctrine *ejusdem generis*, it is clear that under sub-

section P the owner would clearly have the right to order such supplies and repairs. Under subsection Q, anybody having authority from the owner, and under subsection R, the parties mentioned in subsection Q and officers and agents of the charterer, etc. All of these provisions down to the starting of the clause "but nothing in this section" (R) etc., clearly give the owner the right to order such repairs and supplies on the credit of the vessel and confer a lien. Subsection R refers exclusively to authority from the owner, for clearly, if the owner could not give authority to a ship repair company, stevedore or tug boat concern or others, then no one would seem to have authority to authorize a lien to attach to the vessel. The intention of the Act was for the protection of the owner against the placing of unauthorized liens upon his vessel. There is nothing in the Act which states or intimates that it was for the protection of a mortgagee as against the right of the owner to place any liens upon the vessel. The duty of the mortgagee is to protect himself by complying with the provisions of the statute.

With reference to the provision in subsection R that "nothing in this section shall be construed to confer a lien where the furnisher knew, or by the exercise of reasonable diligence could have ascertained, that because of the terms of * * * agreement for sale of the vessel, or for any other reason, the person ordering the repairs, supplies or other necessaries, was without authority to bind the vessel therefor."

(a) The language "agreement for sale of the vessel" refers to a case where the owner agrees to sell the vessel to a purchaser, and the conditional purchaser in possession requests the furnisher of supplies or repairs to do certain work upon the vessel. In this case, as in the case of a charterer, it would be very clear that the furnisher's duty would be to ascertain

who was the owner of record and seeing that a party other than the person ordering repairs was the owner, he would then be put upon notice and could not obtain a lien upon the vessel, unless with the consent of the owner.

(b) The phrase "or for any other reason" refers clearly, by reason of the context, to the fact that if for any other reason the furnisher knew, or by the exercise of reasonable diligence could have ascertained, that the party ordering the supplies did not have authority *from the owner*, as shown in subsections P and Q, that then no lien would arise. For who could give or refuse authority but the owner?

The effect of the Trial Court's construction of these words was to bring within this language an ordinary mortgage given by an absolute owner. This construction has been held to be erroneous in the case of *The Buckhannon*, 299 Fed. 519, where the Court in course of its opinion said, at page 521:

> "The Buckhannon was not a chartered ship at all; she was owned absolutely by the claimants when the events, giving rise to litigation, occurred. She was a mortgaged vessel, but it is a point too familiar to need citation that the mere fact that there is a mortgage and not a preferred mortgage upon a ship, does not in the least prevent or limit the right of her owner, or that owner's lawful agents to pledge the credit of the vessel by the incurring of a maritime lien. This is because the maritime lien is superior to the mortgage and takes no cognizance of the mortgage as such."

(c) The words "was without authority to bind the vessel therefor" refer, on reading all three sections, to authority *from the owner*.

To assert that the United States Shipping Board may make an agreement with a purchaser of a vessel which would prevent him, as owner, from incurring maritime liens, is to assert a proposition of law for which there is no reason or authority. The owner is the fountainhead and all authority and all prohibitions to a charterer, operator under a purchase agreement or owner pro hac vice come from the owner.

In the case of the *Anna E. Morse*, 286 Fed. Rep. at page 797, the court in commenting on subsection R used the following language:

> "Thus, speaking broadly, the law presumes the owner's authority in one entrusted with a ship to procure supplies on the pledge of the ship, unless the owner has withheld his authority and the furnisher knew it or by diligence could have ascertained it. * * * The exception to the remedy which the law affords one furnishing supplies, is operative only when by reason of some circumstance he either knew or by diligence could have ascertained that the person ordering these supplies was without the authority of the owner which otherwise the law presumes."

The agreement for sale of this vessel introduced by the Respondent as additional evidence in the Circuit Court of Appeals (R. 81-88) has no standing in this case whatever.

If such an agreement ever existed, it was superceded and terminated by the execution of an absolute bill of sale and the giving of a mortgage.

The American Star Line, Inc., upon the receipt of the bill of sale from the Government became the absolute owner of said vessel in place of being the conditional vendee under the alleged agreement for sale. The two capacities are absoultely inconsistent and can-

not exist contemporaneously. The Respondent contended that the terms of the agreement should be continued and carried over after the transfer of title but no agreement between the parties can change their status in law.

Whatever may have been the intention of the parties the mortgage and bill of sale which followed and superceded the agreement did not incorporate or refer to said agreement either directly or indirectly. The owner's title and legal status of the vessel must be determined from the documents of title of the vessel which are on record and cannot be affected by an unrecorded document which was wiped out by a subsequent transaction and not referred to in said transaction in any way.

The failure of the Circuit Court of Appeals to refer to this agreement in any way in its opinion, indicates how little importance was attached to it by that Court.

The lien of the libelant having arisen prior in time to the indorsement of the fact of the mortgage on the ship's documents is therefore a preferred maritime lien within the meaning of subsection M of the Ship Mortgage Act.

This must clearly appear from a reading of said subsection M, which is as follows:

> "(a) When used hereinafter in this section the term 'preferred maritime lien' means (1) *a lien arising prior in time to the recording and indorsement of a preferred mortgage in accordance with the provisions of this section;* or (2) a lien for damages arising out of tort, for wages of a stevedore when employed directly by the owner, operator, master, ship's husband, or agent of the vessel, for wages of the crew of the

vessel, for general average, and for salvage, including contract salvage.

"(b) Upon the sale of any mortgaged vessel by order of a district court of the United States in any suit in rem in admiralty for the enforcement of a preferred mortgage lien thereon, all pre-existing claims in the vessel, including any possessory common-law lien of which a lienor is deprived under the provisions of subsection I, shall be held terminated and shall thereafter attach, in like amount and in accordance with their respective priorities, to the proceeds of the sale; except that the preferred mortgage lien shall have priority over all claims against the vessel, except (1) preferred maritime liens, and (2) expenses and fees allowed and costs taxed, by the Court."

The definition of a preferred maritime lien, above given as "a lien arising prior in time to the recording and indorsement of a preferred mortgage in accordance with the provisions of this section", clearly indicates that it was the intent of Congress to allow any such liens as might be created prior to the carrying out of all the requirements necessary to make a mortgage a preferred mortgage and clearly sustains the claims of the Petitioner that the making of such indorsement is mandatory if a mortgagee is to have the benefits derived from having his mortgage classed as a preferred mortgage.

However, regardless of whether indorsement is mandatory to give a mortgage a preferred status, in any event subsection M expressly provides that the mortgage shall be subordinate to a lien arising under the conditions mentioned therein.

The expression "recording and indorsement", as here

used, is conjunctive and consequently a lien which has arisen prior to either of the essential acts of recording or indorsing is a preferred maritime lien within the meaning of the Act.

A similar expression has been construed in the case of *Heitz* vs. *Ruppert* (218 N. Y. 148) that Court, Judge Pound writing the opinion, considered the meaning of the words "arising out of and in the course of employment." He said:

> "The words are conjunctive and relief can be had under the act only when the act arose both 'out of' and 'in the course of' employment. The injury must be received (1) while the workman is doing the duty he is employed to perform, and also (2) as a natural incident to the work. It must be one of the risks connected with the employment, flowing therefrom as a natural consequence and directly connected with the work."

In the case of *Rice et al.* v. *United States*, 33 Fed. 910, the Court in the course of its opinion, at page 911, said in this connection:

> "To give the effect to this phrase contended for by the government, we must either change the word 'and' to 'or' or add words which would have the effect to compel the word 'and' to be read and taken disjunctively and distributively. This is sometimes done, but, when it is, the reason for so doing must be very cogent. The intention of Congress to make a rule different from that which the words of the act plainly express must be extremely clear.
>
> Congress is presumed to have used the appropriate words to convey its meaning, and when these words are not of doubtful meaning the court must give them effect. It cannot sub-

> stitute, for the clear expressions which Congress has actually used, other expressions, which the court think Congress ought to have used. Undoubtedly, 'and' is not always to be taken conjunctively. It is sometimes read as if it were 'or', and taken disjunctively and distributively, but this is only done where that reading is necessary to give effect to the intention of the legislature, as plainly expressed in other parts of the act, or deducible therefrom."

Further, that the act contemplated the power in the mortgagor to create a preferred maritime lien before indorsement, even though the mortgage had been recorded, is shown by subsection F, a part of which subsection reads as follows:

> "The mortgagor * * * 2—without the consent of the mortgagee shall not incur, after the execution of such mortgage and before the mortgagee has had a reasonable time in which to record the mortgage and have indorsements in respect thereto made upon the documents of the vessel, any contractual obligation creating a lien upon the vessel * * *."

This section obligates only the mortgagor and mortgagee. It does not and cannot affect the rights of third parties, otherwise a situation might be created where there never could be a preferred maritime lien against the vessel, as in case where the mortgagee refrains from having the mortgage indorsed upon the ship's papers.

In any event, the prohibition, as the statute plainly says, continues only for a reasonable time, while in the instant case the mortgagee failed to have the indorsement made until June 27, 1921, when his mortgage was in fact recorded in August, 1920, and opportunity to

have such indorsement on the ship's papers was afforded by the fact that the vessel was entered in the Port of New York on September 21, 1920, and at other times prior to the time of making the indorsement. Therefore, after the reasonable time provided in subsection F, subdivision 2, any liens which are incurred are clearly preferred maritime liens within the meaning of subsection M.

If Congress had intended that the recording of a mortgage alone would be sufficient to prevent any maritime liens acquired thereafter becoming preferred maritime liens, there would have been no occasion whatever for the use of the word "indorsement" in this connection.

The decree of the Circuit Court of Appeals should be reversed insofar as it holds that the maritime lien of the petitioner is junior to the lien of the respondent Luber and that the mortgage of the respondent is a preferred mortgage within the terms of the Act. The petitioner should be held to have a maritime lien on said Steamship "Northern Star" superior to the mortgage of the respondent and an order made directing the entry of a final decree in favor of the petitioner in the sum of One Thousand Seven Hundred and Five and 87/100 Dollars ($1,705.87) together with interest and costs.

Respectfully submitted,

BARBER & STETSON,
Proctors for Petitioner.

APR 11 19
WM. R. STANS

No. [redacted] 326

Supreme Court of the United States,

OCTOBER TERM, 1[redacted] 1925

MORSE DRY DOCK & REPAIR COMPANY,
Petitioner,

—against—

Steamship "NORTHERN STAR," her engines, etc.,
HARRY LUBER,
Intervening Petitioner, Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

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Court Press, N. Y. C. Bowling Green, 2820

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Intervening Petitioner, Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

The petitioner seeks to obtain a review by this Court of a final decision of the Circuit Court of Appeals for the Second Circuit, which affirmed a decision in admiralty of the District Court for the Eastern District of New York granting the respondent full recovery on his intervening petition as the holder of a preferred mortgage against the Steamship "Northern Star," on the ground that the respondent's claim was prior to the claim of the petitioner for repairs to the Steamship "Northern Star."

The Facts.

The opinion of the Circuit Court of Appeals concisely states the facts of the case, and its statement of facts is quoted as follows, since the petitioner's statement contains some variations from it:

> "The vessel was a former government owned ship and was sold to the American Star Line Inc.

on August 9, 1920. The latter gave the United States of America a preferred mortgage and ten promissory notes in amount of $1,217,437.50, covering the balance due on the purchase price. The bill of sale of (and) the mortgage was (were) recorded at the Custom House at the Port of New York on August 11, 1920. When so given, the 'Northern Star' was at sea. Upon its return to an American port, a certified copy of the mortgage was placed on board the vessel and kept with the ship's papers continuously from September 23, 1920. But the Collector of Customs did not endorse the mortgage upon the ship's papers until June 27, 1921. The appellant, between November 14th and November 27th, 1920, at the request of the American Star Line Inc., furnished repairs to the steamship at the Port of New York in the amount for which this libel is filed. On December 22, 1920, receivers were appointed for the American Star Line Inc., a New York corporation, because of defaults in this agreement of sale and the preferred mortgage. On August 4, 1923, the intervenor-appellee purchased the mortgage of the United States for $117,000. On August 2, 1923, the District Court entered an order permitting all persons claiming any interest in the 'Northern Star' to file libels against the vessel and prosecute the same to the satisfaction thereof."

The words in parentheses are interpolated for greater clarity.

The Sole Issue.

Although the petition sets forth two propositions, the second really begs the question raised by the first; for, to quote the opinion of the Circuit Court of Appeals "if the mortgage be a preferred one, the lien of the appellant (petitioner) is junior to that of the mortgage lien."

Therefore the sole question raised by the petition is:

Was the mortgage of the United States on the Steamship "Northern Star" a preferred mortgage at the time the claim of the petitioner accrued?

The petitioner contended in both the District Court and on its appeal to the Circuit Court of Appeals that the mortgage did not acquire preferred status until June 27, 1921, by reason of the failure of the Collector of Customs to endorse the mortgage on the ship's papers until that date. The respondent contended in both the District Court and in the Circuit Court of Appeals that since all the steps within the power of the mortgagor or mortgagee had been taken, the mortgage acquired preferred status before the petitioner's claim for repairs arose. The mortgage had been recorded on August 11, 1920, and a certified copy of it had been placed on board the vessel, and kept with the ship's papers continuously from September 23, 1920. Consequently, the preferred status of the mortgage was not dependent upon the endorsement by the Collector of Customs.

Both the District Court and the Circuit Court of Appeals sustained the respondent's contention and held that the mortgage was a preferred mortgage at the time the petitioner's claim arose.

In passing upon this question, the District Court said:

> "Libellant claims that the said mortgage held by Harry Luber was not a preferred mortgage at the time that libellant made the repairs to said steamship because it was not endorsed on the ship's papers.
>
> So much of the law in force at the time libellant made such repairs to said steamship as is necessary for consideration in the instant case reads as follows:
>
> 'Section 30, Ship Mortgage Act 1920, 41 Stat. L. 1,000:

Subsection C. (a) No sale, conveyance, or mortgage which, at the time such sale, conveyance, or mortgage is made, include a vessel of the United States, or any portion thereof, as the whole or any part of the vessel sold, conveyed, or mortgaged shall be valid, in respect to such vessel, against any persons other than the grantor or mortgagor, his heir or devisee, and a person having actual notice thereof, until such bill of sale, conveyance, or mortgage is recorded in the office of the collector of customs of the port of documentation of such vessel, as provided in subdivision (b) of this subsection.

Subsection D. (a) A valid mortgage which, at the time it is made includes the whole of any vessel of the United States of 200 gross tons and upwards, shall in addition have, in respect to such vessel and as of the date of the compliance with all the provisions of this subdivision, the preferred status given by the provisions of subsection M, if—

(b) Any mortgage which complies in respect to any vessel with the conditions enumerated in this subsection is hereafter in this section called a "preferred mortgage" as to such vessel.

(c) There shall be endorsed upon the documents of a vessel covered by a preferred mortgage—

(d) Such endorsement shall be made (1) by the collector of customs of the port of documentation of the mortgaged vessel, or (2) by the collector of customs of any port in which the vessel is found, if such collector is directed to make the endorsement by the collector of customs of the port of documentation; and no clearance shall be issued to the vessel until such endorsement is made. The collector of customs of the port of documentation shall give such direction by wire or letter at the request of the mortgagee and upon the tender of the cost of communica-

tion of such direction. Whenever any new document is issued for the vessel such endorsement shall be transferred to and endorsed upon the new document by the collector of customs.

Subsection E. The collector of customs upon the recording of a preferred mortgage shall deliver two certified copies thereof to the mortgagor who shall place, and use due diligence to retain, one copy on board the mortgaged vessel and cause such copy and the documents of the vessel to be exhibited by the master to any person having business with the vessel, which may give rise to a maritime lien upon the vessel or to the sale, conveyance, or mortgage thereof. The master of the vessel shall, upon the request of any such person, exhibit to him the documents of the vessel and the copy of any preferred mortgage of the vessel placed on board thereof.'

The duty of endorsing the fact of the existence of the mortgage on the ship's papers is placed upon the Collector and not upon the mortgagor or mortgagee and must be done by the Collector of the home port of the vessel but if at that time she is in any other port of the United States, the endorsement may be made by the Collector of that port upon direction of the Collector of the vessel's home port, but that provision has no application in the instant case because the vessel at the time of the recording of the mortgage was on the high seas and no endorsement could have been made until her return to the United States.

The first port at which the said vessel was cleared after the recording of the mortgage was the port of New York, its home port, and it was the duty of the Collector to have made such endorsement when said vessel cleared on September 22, 1920.

The endorsement on the ship's papers could not be made by the mortgagee, and therefore if the failure of the Collector to make such endorse-

ment be held to deprive the mortgage of its status as a preferred mortgage the whole purpose of Congress would fail.

That Congress realized that this situation might arise appears as the reading of the Act continues, and in construing any part of Section 30 it is necessary to construe it as a whole and therefore it did not intend to penalize the mortgagee for any failure of the collector to perform his duty, but place the penalty on him (see subsection J) (c):

> 'If any person enters into any contract secured by, or upon the credit of, a vessel of the United States covered by a preferred mortgage, and suffers pecuniary loss * * *'

What did the libellant lose by the failure of the Collector to make the endorsement?

The mortgage was recorded in the same city where the libellant had its place of business, a certified copy was on the ship, and surely more information could be gained from an examination of the copy than from any endorsement on the ship's papers.

Bark Moshulu, 1923 A. M. C. 1091.

If the libellant suffered any loss he could recover the same from the Collector of the Port (Subsection J) (c) *supra*.

I therefore am of the opinion that the provision for endorsing the fact of the mortgage on the ship's papers is directory, not mandatory, and the mortgage in question had a preferred status from the date it was recorded, August 11, 1920.

The Nanking, 1923 A. M. C. 1191."

The petitioner appealed from this decision to the Circuit Court of Appeals which affirmed the decision

of the District Court, although it differed with the lower Court on the question whether the petitioner had a maritime lien in the first instance. In affirming the District Court's decision that the mortgage had acquired preferred status when the petitioner's claim accrued, the Circuit Court of Appeals said:

> "* * * The appellant attacks the validity of the mortgage as a preferred mortgage, contending that the failure to endorse it on the ship's papers before June 27th, 1921, made it invalid prior thereto as such preferred status. It had been recorded in the Custom House on August 11, 1920, and a certified copy placed on the vessel on September 28, 1920. The failure to endorse the mortgage on the ship's papers was the failure of the Collector of Customs. The Act provides for the endorsement of the mortgage on the ship's papers and Sub. Div. M provides that a lien arising prior in time to the recording and endorsement of a preferred mortgage, is a preferred maritime lien, but these provisions must be interpreted in the light of the whole statute. Sub. Div. D provides that such endorsement shall be made by the Collector of Customs at the port of documentation of the mortgaged vessel or upon request of the mortgagee by the Collector of Customs at the port where the vessel may be found. It will be noted that the duty is imposed upon the Collector of Customs. When a vessel is not at her home port, the Collector of Customs at that port cannot make the endorsements on the papers and the endorsement apparently must be made in an American port. Therefore, such recordation may not be made on an American vessel which happens to be plying between foreign ports. But it evidently was the intention of the Ship Mortgage Act to protect the mortgagee even under such circumstances. That the Act places very strongly upon the Collector of Customs, the duty of making the endorsement, is indicated by

Sub. Div. D which provides, 'and no clearance shall be issued to the vessel until such indorsement is made.' Sub. Div. J renders the Collector of Customs liable to persons entering into any contract on the credit of the vessel who have suffered any damage as a result of the Collector's failure to perform any duty required of him under the Act. These sections indicate that it was not intended by Congress to penalize a mortgagee for the failure of the Collector of Customs to perform his duty, but placed the responsibility on the Collector. Furthermore, liability of the mortgagor for any damage to third parties resulting from any failure upon the mortgagor's part, is provided for, and no mention is made of liability on the part of the mortgagee. It was pointed out in *The Egeria* (294 Fed. 791), that such endorsement of the mortgage was a matter with which the mortgagee had nothing to do; that it was the duty of the Collector of Customs to make the endorsement and the presumption would be, until the contrary was shown, that the Collector duly performed his duty and if there was a failure of allegation in this respect, the remedy was to except to the libel, for the defect was one which might have been cured by amendment. The mortgagee, in the nature of things, has no control over the mortgagor or the Collector of Customs, and the Act indicates that it is not contemplated that the mortgage be invalid by reason of the failure of indorsement by the Collector. It is the intention of the Ship Mortgage Act to protect the mortgagee, not to penalize him for the failure of a government official to comply with the provisions of the Act. All was done here that could be done by the recordation of the mortgage, the placing of it among the papers of the ship, and the delay of the Collector of Customs in making the endorsement, to some extent excused by reason of the fact that the vessel was on the high seas, will not invalidate this mortgage as a preferred mortgage. (*The Nanking*, 1923 A. M. C. 1191,

Dist. Ct. No. Dis. of Calif.; *The Oconee*, 280 Fed. 927; *The Oswego*, 292 Fed. 403.) The purpose of such an endorsement manifestly is to give notice to persons having dealings with the vessel that there is a preferred mortgage upon it. Such notice was amply given by the record of August 11, 1920, in the Custom House and filing a certified copy on board the vessel with its papers on September 23, 1920. Reasonable care and diligence by way of investigation, would have given the appellant knowledge of the mortgage and its terms before the repairs were made in November, 1920. (*United States* v. *Carver*, 260 U. S. 482; *The Princess Matoika*, 1924 A. M. C. 1033; *The Mossabee*, 1923 A. M. C. 874, C. C. A. 4th Circuit; *The Susanna*, 2 (2nd) Fed. 410.)"

The Decisions of the Point Are Uniform.

Although the petitioner seeks to convey the impression that there is a divergence of opinion on the sole point raised by it, the fact is that the decisions of the various courts uniformly support the conclusions reached by the District Court and the Circuit Court of Appeals in the case at bar.

In the first place, a similar holding was made by the District Court for the Northern District of California on August 20, 1923, in *The Nanking*, 292 Fed. 641, 1923 A. M. C. 1191. In that case, Judge Partridge, speaking of the effect of the endorsement said at pages 1202 and 1203:

> "Next, that this provision of the mortgage was not and is not endorsed upon the vessels' documents as required by subdivision (1), (c) (4) and (e) of subsection 'D' of said Section 30, in that while said purported mortgage or deed of trust included property other than the vessel,

to wit, forty-eight hundred and fifty shares of the capital stock of China Pacific Steamship Company, Limited, and so forth, no endorsement was made upon the vessels documents of a specified portion of the mortgage indebtedness.

I would be loath, indeed, to decide that people who had, in good faith, invested three-quarters of a million dollars upon both these vessels and other vessels mortgaged should be denied their right to get such of their money as they can out of the proceeds, by any strained constructions of the Act. I would be particularly loath to do that for the reason that at the time this mortgage or deed of trust was prepared the Ship Mortgage Act was a new thing. As I remember it, this mortgage was prepared within a few weeks or at most, within a month or two after the Ship Mortgage Act became a law.

But aside from that I am convinced that the provision of the Ship Mortgage Act for the endorsement upon the papers of the vessel is merely directory and failure to do so does not make the mortgage void * * *.

The exceptions, therefore, or so much of the exceptions to the answers as go to the constitutionality of the Act and the allegation that the mortgage in this particular case is void as it does not conform to the Act, will be sustained without leave to amend."

It will be noted that in the *Nanking* "the mortgage was not and is not endorsed upon the vessels' documents," whereas in the case at bar, the endorsement was made upon the ship's papers on June 27, 1921. Consequently the Court's holding in that case goes even farther than the decisions of the District Court and the Circuit Court of Appeals in the case at bar.

In *The Nanking*, the Court viewed as a strained construction of the Ship Mortgage Act the contention that

endorsement was necessary for the preferred status of a mortgage.

The foregoing interpretation is supported by a more recent decision of the Circuit Court of Appeals for the Ninth Circuit, *The Egeria* (C. C. A., 9th Circ., Dec. 17, 1923, rehearing denied Feb. 11, 1924), 294 Fed. 791. In that case, Judge Gilbert, writing the opinion for the Court, said at pages 792 and 793:

> "The copy of the mortgage filed as an exhibit to the libel contained the requisite affidavit, and while it is true that *the libel failed to allege that the mortgage was indorsed upon the ship's documents*, the absence of such an allegation is believed to be immaterial. *Such indorsement of the mortgage was a matter with which the mortgagee had nothing to do. It was the duty of the collector of customs to make the indorsement*, and the presumption would be, until the contrary were shown, that the collector duly performed his duty. And if indeed there was failure of allegation in that respect the remedy of the appellants was to except to the libel, the defect being one which might have been cured by amendment. *In line with our view of the statute are the decisions in the Oconee* (D. C. 280 Fed. 927, *and The Owego* (D. C.) 292 Fed. 403, *holding that the statute is remedial and should be liberally construed.* In *The Oconee* case the Court said:
>
> > *'The statute itself nowhere seems to contemplate any default on the part of the mortgagee for the failure of compliance with those sections of the act to be performed by the mortgagor and the master.* The mortgagor * * * is subjected to a penalty if he fails to deliver on board the ship a copy of the mortgage. The master is likewise subject to a penalty if he fails to exhibit the same when called upon. *The mortgagee, in the nature of things, has no control over either, and the act clearly does not con-*

template the invalidity of the mortgage by reason of such failure on their part.'"

In the case at bar, the mortgage was on record at the Custom House in New York continuously from August 11, 1920, and there was a certified copy of it on the vessel with the ship's papers from September 23, 1920, long before the endorsement was made by the Collector of Customs on June 27, 1921. The repairs for which the petitioner brought suit were made after September 23, 1920; in fact, between November 14th and November 27, 1920.

Moreover, the repairs were made at the Port of New York by a New York corporation upon a ship whose home port was New York and which was owned by a New York corporation. Both the ship repairer and the shipowner had their principal offices in New York City (fols. 6, 21, 56, 111 of Record).

Consequently the petitioner must have known or certainly could have known by the exercise of the slightest diligence that there was a preferred mortgage on the vessel, which would come ahead of its claim in any event. A certified copy of the mortgage giving all its provisions was available to the petitioner on board the ship all the while it was making the repairs to the vessel.

In addition the mortgage was available for examination at the Custom House in the Port of New York where it was recorded, and at the office of the American Star Line, Inc., which owned the "Northern Star."

A certified copy of the mortgage itself which was with the ship's papers is certainly better notice than a brief endorsement on the papers saying that such a mortgage exists. The petitioner cannot say it was prejudiced by lack of endorsement until June 27, 1921, for, if it had asked for the ship's papers, it would have found the mortgage with them. It was bound by law to

make reasonable and diligent inquiry as to whether it could have a lien on the ship and the slightest inquiry, either on board the vessel or at the Custom House or at the office of the American Star Line, Inc., would have shown it that there was a preferred mortgage on the "Northern Star."

Consequently, with a certified copy of the mortgage on board the ship, the endorsement was for all practical purposes absolutely immaterial. In these circumstances, it would be an especially artificial interpretation to say that the endorsement was necessary to give the mortgage preferred status.

The effect of having a certified copy of the mortgage on board the steamer is well stated by Judge Dooling in the recent case of the *Bark Moshulu* (N. D. Cal., Oct. 10, 1923), 298 Fed. 348, as follows:

> "* * * The endorsement of the preferred mortgage claim may work an apparent hardship to the other lien claimant, but *it is to be noted that a certified copy of the mortgage was on board the vessel subject to examination by* any person having business with the vessel which might give rise to a maritime lien and that the master was bound to exhibit to any such person the documents of the vessel and such copy (subsection E, Act June 5th, 1920). *So that claimants had ample opportunity to know that any claim on their part for services rendered the vessel would be subordinate to the lien of the mortgage.*"

In its endeavor to give the impression that there is a divergence of Court decisions, the petitioner quotes from the District Court's opinion in the *Northern Wave*, 298 Fed. 188, and refers to the *Bethlehem*, 286 Fed. 400. As a matter of fact, these cases did not in any way pass upon the preferred status of a mortgage, but the princi-

pal question involved in them was the libellant's right to any maritime lien.

Both the *Bethlehem* and the *Northern Wave* were heard together on appeal and were considered in one decision of the Circuit Court of Appeals rendered February 15, 1925. *Bethlehem-Northern Wave* (C. C. A., 3rd Circ.), 1925 A. M. C. 569. The questions raised were stated by the Court of Appeals at page 572 as follows:

> "The main questions arising from the whole transaction are, first whether libellants for supplies and repairs used such diligence to find the agreements of purchase and the mortgages, which contained covenants denying the owner the right to incur liens upon the ships, as would entitle them to maritime liens under the Act of 1920; and, secondly, if they did, whether the decrees *pro confesso* are subject to collateral attack and to be set aside by orders of reference to a commissioner more than four months after the date of the decrees and by renewed orders of reference made about two years thereafter, there being no question of fraud or of the lack of the court's jurisdiction."

It will be noted, therefore, that the preferred status of the mortgage was not a question before the Court.

Moreover, the Appellate Court's statement of facts at page 571 shows that those cases differed materially from the case at bar in that copies of the mortgages were not carried with the ships' papers.

> "On November 20, 1920, agreements of sale of the ships were executed as of October 22, 1920, the date the ships were delivered. The purchaser also executed mortgages against the ships covering the deferred payments which were recorded at Baltimore, Maryland, the home port, on November 20, but endorsement of the mortgages on the ship's

> documents was not made until January 14, 1921, *nor were copies of the mortgages carried on the ships,* as required by the Ship Mortgage Act of 1920 to give them the status of preferred mortgages."

Consequently, there is no divergence of Court opinions, but, on the contrary, those Courts which have passed upon the sole question raised by the petition in the case at bar have uniformly sustained the views of the District Court and the Circuit Court of Appeals in *Morse Dry Dock v. Northern Star.*

The District Court and the Circuit Court of Appeals having both held that the mortgage on the "Northern Star" had preferred status before the petitioner's claim arose and the decisions of the courts in the other circuits being in conformity with that holding, the petition should be denied.

Respectfully submitted,

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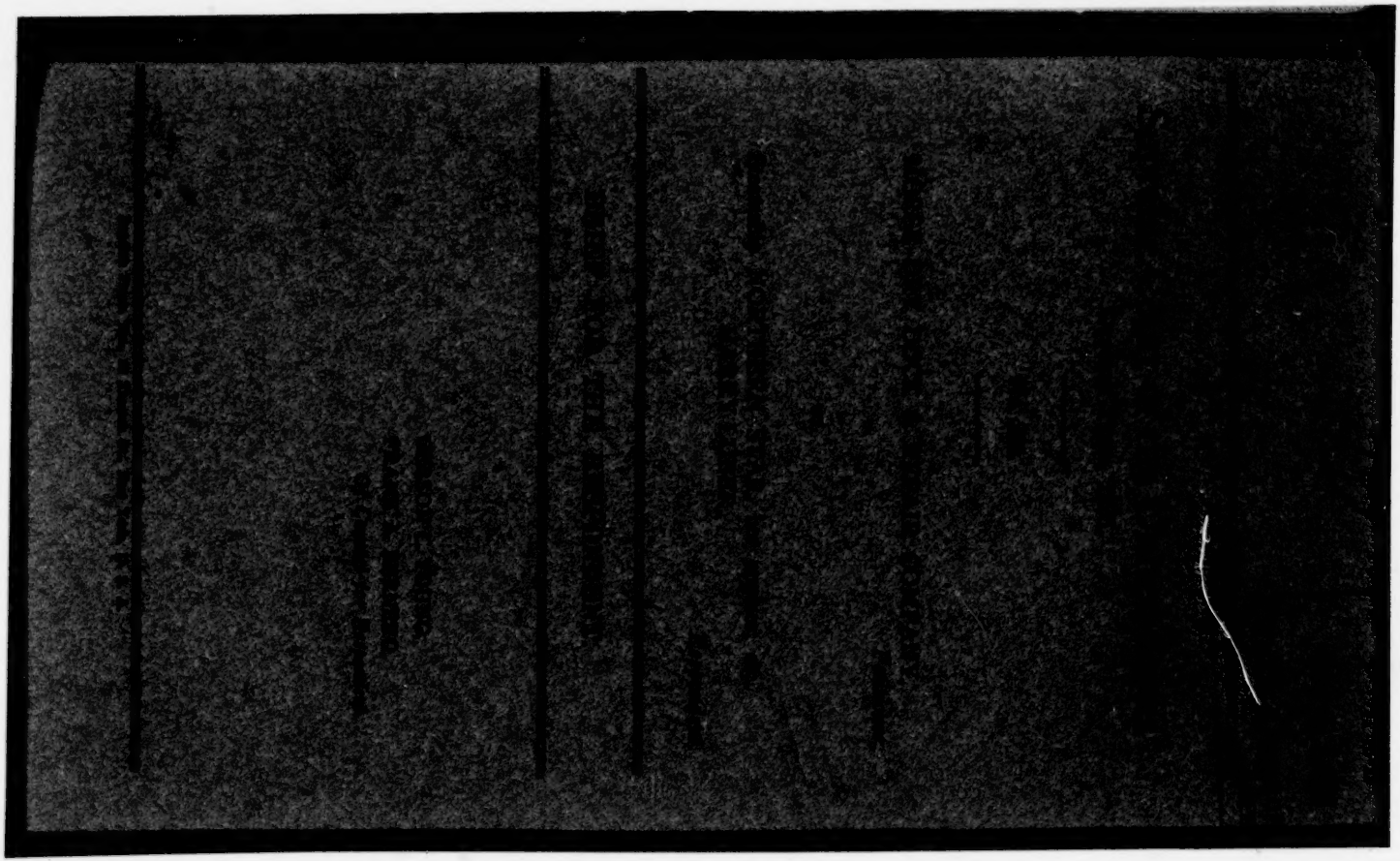
New York, N. Y., April 10, 1925.



CONTENTS.

	Page
Statement	1
The Facts	2
The Issues	4

FIRST POINT.

The Morse Dry Dock & Repair Company has no maritime lien whatever against the steamship "Northern Star" 5

I.

It is charged with notice of the terms of both the agreement of sale and the mortgage 8

II.

The agreement of sale prohibited the creation of maritime liens on the vessel 15

III.

The mortgage prohibited the creation of maritime liens on the vessel 32

IV.

Even if the contentions of the Morse Dry Dock & Repair Company are fully accepted they merely confirm the fact that the petitioner cannot have a maritime lien on the vessel 42

PAGE

SECOND POINT.

SINCE THE MORSE DRY DOCK & REPAIR COMPANY HAS NO MARITIME LIEN AGAINST THE "NORTHERN STAR" THE MORTGAGEE IS ENTITLED TO THE PROCEEDS OF SALE OF THE STEAMER 43

THIRD POINT.

EVEN IF THE MORSE DRY DOCK & REPAIR COMPANY HAD A MARITIME LIEN AGAINST THE "NORTHERN STAR" THE PREFERRED MORTGAGE LIEN WOULD HAVE PRIORITY 45

I.

The mortgage on the *Northern Star* has preferred status as of September 23, 1920, the date when a certified copy was placed on board the vessel with the ship's papers 50

II.

There is no possible doubt that the mortgage acquired preferred status at least as of June 27, 1921, the date of its endorsement 69

III.

Even if it is assumed that the Morse Dry Dock & Repair Company has a maritime lien and that the mortgage did not acquire preferred status until June 27, 1921, the repairmen's lien is not a preferred maritime lien within the meaning of the Ship Mortgage Act and therefore does not take priority over the preferred mortgage lien 70

PAGE

(a) A preferred maritime lien is one that arose prior in time to both the recording and the endorsement of the preferred mortgage 71

(b) The Morse Dry Dock & Repair Company does not have a preferred maritime lien 72

LAST POINT.

THE DECREE OF THE CIRCUIT COURT OF APPEALS SHOULD BE MODIFIED SO AS TO DENY THE MORSE DRY DOCK & REPAIR COMPANY A MARITIME LIEN AND AS MODIFIED THE DECREE SHOULD BE AFFIRMED 73

TABLE OF CASES.

	Page
The Admiral Goodrich (9th Circ., 1923), 288 Fed., 363	14
The Ascutney (4th Circ., 1923), 289 Fed., 802	14
The Awensdaw (C. C. A. 4th Circ., 1923), 289 Fed., 803	14
American Bell Tel. Co. *v.* National Tel. Mfg. Co., 109 Fed., 976, 1018	33
The Alpin, 23 Fed., 815, 816	33
The American Star, decided by Judge Lynch May 29, 1924, as yet reported only in 1924 American Maritime Cases 1064	30, 39, 40
The Bertha F. Walker, 220 Fed., 667, 669	32
The Bergen, 7 F (2d) 379	49
Bark Moshulu (N. D. Cal., Oct. 10, 1923), 298 Fed., 348	66
The Bethlehem, 4 F. (2d) 308	66
The Colon, 241 Fed., 592, 593	32
Consolidated Coal Co. *v.* Knickerbocker Steam Towage Co., 200 Fed., 840, 845	33
Choctaw & M. R. Co. *v.* Newton, 140 Fed., 225, 228	33
Davidson *v.* Baldwin, C. C. A., 6th, 1897, 79 Fed., 95	29
The Degama, 150 Fed., 323, 324	33
Everett *v.* United States, C. C. A., 9th, 284 Fed. 203	29
The Egeria (C. C. A., 9th Circ., Dec. 17, 1923, rehearing denied Feb. 11, 1924), 294 Fed. 791	65
Frey & Son, Inc. *v.* United States of America (C. C. A., 4th Circ., Sept. 29, 1924), 1 F (2d) 963	23, 26
The Fred M. Lawrence, 15 Fed., 635	33

PAGE

The Georgetown, 135 Fed., 854, 859 33

The Henry S. Grove (W. D. Wash., 1923), 287 Fed., 247 14

John Baizley Iron Works *v.* United States, E. D. Pa., Feb. 7, 1925, 6 F (2d), 25 27
The John Jay, 1854, 17 How. (58 U. S.), 399 42
The J. E. Rumbell (1892), 148 U. S. 1 43

The Kalorama, (1869), 10 Wallace (77 U. S.) 204 11
The Kate (1869), 164 U. S., 458 12
The Katie O'Neil (D. C., N. D. Cal., 1894), 65 Fed. 111, 113 45

The Lulu (1869), 10 Wallace (77 U. S.), 192 11

The Moosabee (1924), 1 F (2d) 964 ..... 21, 22, 23
Morgan's Assignees *v.* Shinn (1872), 82 U. S. 105 29

The Northern Star, 295 Fed. 366 1
The Northern Star, 7 F. (2d) 505 2
The New Rochelle (N. D., Ohio), 1923, American Maritime Cases, 362 14
The New York, 175 U. S., 187, 204 32
Norquet *v.* Paramount Worsted Mills, 177 Fed., 970, 975 33
The Nanking, 292 Fed. 641, 1923, American Maritime Cases 63, 64
Northern Wave, 4 F (2d) 308 66

The Oconee, 280 Fed. 927 ..... 67, 68

The Princess Matoika (1924), 1 F. (2d) 233 ..... 20, 21

Runkle *v.* Burnham, 153 U. S., 216, 228 32
The Rupert City (D. C. Wash. N. D. 1914) 213 Fed. 263 ..... 43, 44

PAGE

Standard Oil Co. *v.* United States, *et al.*, (C. C. A., 4th Circ., Sept. 29, 1924), 1 F. (2d) 961..... 23, 25
The Susanna, C. C. A. 4th, 1924, 2 F. (2d) 410..... 49

Thomas *v.* Osborn (1856), 19 Howard (60 U. S.) 22.... 10
The Thordis (E. D., N. Y.), 1923 American Maritime Cases, 581 14

United States of America *v.* Amos D. Carver, (1923), 260 U. S. 482.....13, 14, 18, 19, 26, 27

STATUTES.

The Home Port Act, 1925, 43 Stat. 947..... 49, 50

The Merchant Marine Act, 1920, 41 Stat. 988.....7, 36, 47

The Ship Mortgage Act, 1920, 41 Stat. 1000, 15, 36, 41, 47, 48, 51, 52, 53, 54, 55, 56, 68, 70, 71, 72

Revised Statutes, Section 4192, Act of July 20, 1850 ch. 37, s. 1, 9 Stat. 440..... 48

SUPREME COURT OF THE UNITED STATES

MORSE DRY DOCK & REPAIR COMPANY, Petitioner, *vs.* Steamship NORTHERN STAR, her engines, etc.; HARRY LUBER, Respondent.	October Term 1925 No. 326

BRIEF ON BEHALF OF RESPONDENT.

STATEMENT.

This cause comes before this Court in pursuance of a writ of certiorari, issued on April 20, 1925, *Record*, p. 98, to review the decree in admiralty of the United States Circuit Court of Appeals for the Second Circuit in a case involving the right of the Morse Dry Dock & Repair Company to a maritime lien for repairs made to the Steamship *Northern Star* between November 14 and November 27, 1920, and the right of Harry Luber, the holder of a preferred mortgage, to priority over any lien the repairman might have.

The District Court for the Eastern District of New York held that the repairman did not have a maritime lien and that the mortgage was a preferred mortgage, which gave its holder the right to the proceeds of sale of the steamer. *Opinion, Record*, pp. 60 to 66. *The Northern Star*, 295 Fed. 366.

The Circuit Court of Appeals held that the repairman was entitled to a maritime lien, but that the preferred mortgage lien was superior and that the holder of the preferred mortgage was entitled to the proceeds of sale of the *Northern Star* by reason of that priority. *Opinion, Record,* pp. 94 to 97. *The Northern Star,* 7 F. (2d) 505.

The Facts.

The statement of facts in the petitioner's brief is incomplete. The opinion of the Circuit Court of Appeals concisely states most of the important facts as follows, *Record,* pp. 94, 95:

> "The vessel was a former government owned ship and was sold to the American Star Line Inc. on August 9, 1920. The latter gave the United States of America a preferred mortgage and ten promissory notes in amount of $1,217,437.50, covering the balance due on the purchase price. The bill of sale of (and) the mortgage was (were) recorded at the Custom House at the Port of New York on August 11, 1920. When so given, the '*Northern Star*' was at sea. Upon its return to an American port, a certified copy of the mortgage was placed on board the vessel and kept with the ship's papers continuously from September 23, 1920. But the Collector of Customs did not endorse the mortgage upon the ship's papers until June 27, 1921. The appellant, between November 14th and November 27th, 1920, at the request of the American Star Line Inc., furnished repairs to the steamship at the Port of New York in the amount for which this libel is filed. On December 22, 1920, receivers were appointed for the

> American Star Line Inc., a New York corporation, because of defaults in this agreement of sale and the preferred mortgage. On August 4, 1923, the intervenor-appellee purchased the mortgage of the United States for $117,000. On August 2, 1923, the District Court entered an order permitting all persons claiming any interest in the *Northern Star* to file libels against the vessel and prosecute the same to the satisfaction thereof."

The words in parentheses are interpolated for greater clarity.

Additional facts of importance are that the repairs were furnished in the home port of the *Northern Star*, namely, the Port of New York, *Record*, pp. 20, 14, 35; that the Morse Dry Dock & Repair Company is a New York corporation having its office and principal place of business in New York City, *Record*, p. 1; and that the American Star Line, Inc. was also a New York corporation with its office and principal place of business in New York City at the time the repairs were made. *Record*, p. 62.

The proceedings leading to the sale of the vessel and the deposit of the proceeds of sale in the registry of the District Court are stated by the District Court as follows, *Record*, p. 62:

> "The said Steamship *Northern Star* was arrested by process of this Court by libel filed by W. S. Pendleton, Jr. & Company and Joseph A. Rubin, and subsequently sold under a decree in that suit. Before the sale of the said vessel in that suit the libellant herein filed a libel against the said steamship, and the said Harry Luber as the purchaser of said mortgage intervened in this suit."

The Issues.

Although the petitioner seeks to convey the impression in its brief before this Court that the only question is that of the status of the mortgage, *Petitioner's Brief*, p. 14, the first and most important question is whether the Morse Dry Dock & Repair Company has any maritime lien whatever.

That the question of the petitioner's right to a maritime lien, is the paramount issue in the case is shown by the assignments of error filed in the District Court by the Morse Dry Dock & Repair Company, *Record*, pp. 68, 69. The first three articles assign errors because the District Court held that the repairman did not have a maritime lien. The Sixth Article assigns further error on the same ground, *Record*, p. 68. Consequently four out of the eight articles of the assignments of error, including the first three, relate to the question whether the repairman has any lien against the vessel.

The real issues before this Court, therefore, are substantially, as stated by the Circuit Court of Appeals, as follows, *Record*, p. 95:

1. Whether the Morse Dry Dock & Repair Company has a maritime lien under the Maritime Lien Act of 1920 for the work, labor and services performed in repairs to the vessel.

2. Whether the mortgage has preferred status.

3. Whether the mortgage takes priority over the repairman's claim, even if the repairman has a maritime lien.

FIRST POINT.

THE MORSE DRY DOCK & REPAIR COMPANY HAS NO MARITIME LIEN WHATEVER AGAINST THE STEAMSHIP *Northern Star*.

At the outset, it is important to ascertain the relationship of the various parties to the Steamship *Northern Star*.

When the repairs in question were furnished to the vessel it was in the possession of the American Star Line, Inc. *Record*, p. 60. That company had purchased the *Northern Star* from the United States Shipping Board and had executed an agreement of sale on December 24, 1919, *Record*, pp. 81 to 93, and a preferred mortgage on August 9, 1920. *Record*, pp. 38 to 46.

Under both instruments the United States reserved the right to retake possession of the vessel upon the default of the American Star Line, Inc.

The agreement for sale required the American Star Line, Inc. to give the United States a mortgage in substantially the form annexed to the agreement. *Record*, pp. 82, 89-93. This form of mortgage, which in turn incorporated by reference the agreement for sale, provided that the United States of America should have the right to retake the vessel if the American Star Line defaulted in any of the payments of the balance of the purchase price or in the performance of any of the conditions of the mortgage or the purchase agreement. *Record*, pp. 90, 91. These provisions are as follows:

> "*But if default be made in such payment*, or in any one of such payments, *or if default be made in*

the prompt and faithful performance of any of the covenants, agreements and conditions herein contained, or of any of the terms, conditions and agreements of said Purchase Agreement, * * * the party of the second part thereupon may:

* * * * * * * *

"'(c) *Retake said vessel wherever the same may be found,* and hold, lease, operate or otherwise use or dispose of said vessel for such times and upon such terms as the party of the second part may deem to its best advantage.

'(d) *Retake said vessel wherever the same may be found* and sell the same free from any claim by the party of the first part in law, in equity, in admiralty or by statute.

* * * * * * * *

"When any right to retake said vessel shall accrue, *the party of the second part may retake the same wherever the same may be found without prior demand and without legal processes,* and for that purpose may enter upon any dock, pier or other premises where said vessel may be; the party of the second part may take possession of said vessel upon the high seas or in any port, harbor or other place; but without impairing the said right, the party of the first part agrees upon demand to deliver said vessel at its own cost at such place or places as the party of the second part may designate * * *."

Substantially the same provisions giving the United States the right to retake the vessel are contained in the preferred mortgage subsequently executed on August 9, 1920 in Article 2, Section I (c) (d) (e), Section II. *Record,* pp. 42, 43. Finally, the preferred mortgage concluded with the following statement, *Record,* pp. 45, 46:

"Article III—Possession until Default

Until default shall have been made in the due and punctual payment of the interest or of the principal of any note or notes or of some part of such interest or principal, or *until some one or more of the events of default* hereinbefore described shall happen, the party of the first part shall be suffered and permitted to retain actual possession of the vessel, * * *."

It is obvious, therefore, that the status of the American Star Line, Inc., when the repairs in question were made was that of "an agreed purchaser in possession of the vessel" in the sense that that expression is used in Subsection R of the *Maritime Lien Act of 1920,* Act of Congress June 5, 1920, 41 Stat. 1005.

The District Court found as a fact, and this finding was not disturbed by the Circuit Court, that the repairs were ordered by a Mr. Garmey, an independent consulting engineer engaged by the American Star Line, Inc. to look after the repairing of its vessels. *Record,* p. 61. The bills for the repairs were made out to Garmey's firm, McFarlane & Garmey, *Record,* p. 19, and were sent by the Morse Dry Dock & Repair Company to Garmey's firm. *Record,* p. 11. Garmey in turn sent them to the American Star Line, Inc. *Record,* p. 16.

In these circumstances, Garmey was clearly an agent of the agreed purchaser in possession. He was not an employee of the American Star Line, Inc. but was an independent agent. Moreover he did not have any authority to pledge the credit of the vessel. His testimony in that regard, as a witness called by the petitioner, reads as follows, *Record,* p. 19:

"Q. Did you at any time in November, 1920, or prior thereto, have any authority from the American Star Line or its officers to pledge the credit of the vessel *Northern Star?*

"A. None whatever, excepting that I was authorized to go ahead and do work for them. That was pledging the credit, I presume.

"Q. I asked you not about pledging the credit of the American Line, Incorporated, but pledging the credit of the *Northern Star?*

"A. No.

"Q. You mean you had no authority of any kind to pledge the credit of the vessel?

"A. No.

"Q. You have no authority?

"A. No.

"Q. As to authority to pledge the credit of the American Star Line, Inc., is it correct to say that you had authority to pledge its individual credit for work to be done on the vessel?

"A. Yes."

It is apparent from the foregoing that Garmey did not actually pledge the credit of the *Northern Star* for repairs and had no authority to do so. Consequently, if the petitioner has a maritime lien it must be one that is presumed. It will be shown, however, that any such presumption is completely rebutted by additional provisions of the agreement for sale and of the mortgage, with notice of which the petitioner is charged.

I. *It is charged with notice of the terms of both the agreement of sale and the mortgage.*

As has been previously shown, the repairs were made at the vessel's home port, New York City, which was also

the principal place of business of the agreed purchaser in possession and of the Morse Dry Dock & Repair Company.

At the time the repairs were made there was on file at the office of the American Star Line, Inc., at 25 Beaver Street, New York City, a duplicate original of the agreement of sale. *Record,* p. 80. There was also on file at the Custom House at the Port of New York the original mortgage. *Record,* p. 9. Moreover, a certified copy of the mortgage was on board the vessel and remained there continuously up to the time of the marshal's sale. *Record,* pp. 61, 95.

Furthermore, the general superintendent and the assistant superintendent of the repair yard came on board the vessel daily while Garmey was there and discussed the repairs with him. *Record,* pp. 17, 18. Garmey knew at that time that there was a mortgage on the *Northern Star. Record,* p. 18.

They had had previous dealings and the Morse Dry Dock & Repair Company had previously made other repairs on the *Northern Star* and other vessels of the American Star Line. *Record,* pp. 16, 18.

It is very likely in these circumstances that the Morse Dry Dock & Repair Company actually knew of the mortgage and the agreement of sale. However, whether or not they actually knew of them the slightest inquiry on their part would have disclosed fully the terms of these instruments.

The American Star Line's office, being in the same city with that of the repair yard, was readily accessible for an examination of the agreement of sale. If the petitioner did not wish to offend the sensibilities of the American Star Line by requesting the details of that agreement, it could

have ascertained them from the Shipping Board which also had a duplicate original of the agreement of sale on file in its office. *Record*, p. 80.

So far as the mortgage was concerned, it was a matter of public record at the Custom House and the repair company could have examined it there without disclosing to anyone the purpose of its examination. If it did not wish to go as far as the Custom House, it could have procured a certified copy of the mortgage on board the vessel while repairing it. Since the general superintendent and the assistant general superintendent were on board the vessel while Garmey was there, they could have learned from him of the existence of the mortgage.

It is difficult to imagine a situation more favorable to charging a repairman with notice of provisions prohibiting the creation of liens.

Even before the passage of the Maritime Lien Acts of 1910 and 1920 this Court required repairmen and supplymen to exercise due diligence in ascertaining limitations on the right to liens, even where the repairs were made in foreign ports.

This rule was applied by this Court in *Thomas* v. *Osborn* (1856), 19 Howard (60 U. S.), 22, at pages 30 and 31, as follows:

> "But the limitation of the authority of the master to cases of necessity, not only of repairs and supplies, but of credit to obtain them, and the requirement that the lender or furnisher should see to it, that apparently such a case of necessity exists, are as ancient and well established as the authority itself.
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> • • • • • • • • • •

> "To constitute a case of apparent necessity, not only must the repairs and supplies be needful, but it must be apparently necessary for the master to have a credit, to procure them. * * * *And if the lender knows these facts, or has the means, by the use of due diligence, to ascertain them, then no case of apparent necessity exists to have a credit; and the act of the master in procuring a credit does not bind the interest of the general owners in the vessel.*"

The same rule was confirmed in *The Lulu* (1869), 10 Wallace (77 U. S.), 192, at pages 203 and 204 as follows:

> "Viewed in any light it is clear that necessity for credit must be presumed where it appears that the repairs and supplies were ordered by the master, and that they were necessary for the ship when lying in port or to fit her for an intended voyage, *unless it is shown* that the master had funds, or that the owners had sufficient credit, and that the repairer, furnisher, or lender knew those facts or one of them, or *that such facts and circumstances were known to them as were sufficient to put them upon inquiry and to show that if they had used due diligence they would have ascertained that the master was not authorized to obtain any such relief on the credit of the vessel.*"

A similar statement of the rule is found in the same volume in *The Kalorama*, (1869), 10 Wallace (77 U. S.), 204, at pages 212 and 213. There it was said:

> "Where it appears that the repairs and supplies were necessary to preserve the ship in port, or to enable her to proceed on her voyage, and that they were made and furnished in good faith, the pre-

sumption is that the ship, as well as the master and owner, is responsible to those who made the necessary advances, and it is clear that the necessity for credit must be presumed where it appears that the repairs and supplies were ordered by the master, and that they were necessary for the ship, *unless it is shown that the master had funds or that the owner had sufficient credit, and that the repairers, furnishers, and lenders of the money knew those facts or one of them, or that such facts and circumstances were known to them as were sufficient to put them upon inquiry, and to show that if they had used due diligence they would have ascertained that the master was not authorized to obtain any such relief on the credit of the vessel.*"

Justice Harlan reaffirmed the established rule in *The Kate* (1896), 164 U. S., 458, at page 466:

"When, therefore, supplies are furnished to a vessel in a foreign port, upon the order of the master, nothing else appearing, the presumption is that they were furnished on the credit of the vessel and of the owners, and an implied lien is given. But no such necessity can be suggested, and no such reasons urged, in support of an implied lien for supplies furnished to a charterer, when the libellant at the time knew, or by such diligence as good faith required could have ascertained, that the party upon whose order they were furnished was without authority from the owner to obtain supplies on the credit of the vessel, but had undertaken as between itself and the owner, to provide and pay for all supplies required by the vessel.

"*There are many cases in which the recognition or rejection of liens under the maritime law have depended upon the diligence of parties in ascertain-*

ing the limitations imposed by the owners of vessels upon the authority of masters. These cases proceed upon the ground that good faith must have been exercised by the party seeking to enforce a lien upon the vessel."

After the passage of the Maritime Lien Act of 1920 this Court rendered its decision in *United States of America* v. *Amos D. Carver,* (1923), 260 U. S. 482, construing subsection "R" with relation to a charter party and held that the words "the charterers will not suffer nor permit to be continued any lien, etc." prohibited the creation of any lien in behalf of a material-man. Justice Holmes said at pages 489, 490:

"* * * We regard these words as too plain for argument. *They do not allow the material-man to rest upon presumptions until he is put upon inquiry, they call upon him to inquire. To ascertain is to find out by investigation.* If by investigation with reasonable diligence the material-man could have found out that the vessel was under charter, he was chargeable with notice that there was a charter; if in the same way he could have found out its terms he was chargeable with notice of its terms. *In this case it would seem that there would have been no difficulty in finding out both. The Ship Mortgage Act of 1920 repeats the words of the Act of 1910.*

"But it is said that the charter party if known would have shown that the master at least, if not the agent who ordered the supplies, had authority to impose a lien, since the charter party contemplated the possibility of one being created and provided for its removal. *The South Coast,* 251 U. S., 519, is cited as establishing the position. But there is a sufficient

> difference in the language employed there and here to bring about a different result. In *The South Coast,* the contract went no farther than to agree to discharge liens within a month. *Here the primary undertaking was that 'the charterers will not suffer nor permit to be continued any lien,' etc. We read this as meaning will not suffer any lien nor permit the same to be continued. Naturally there are provisions for the removal of the lien if in spite of the primary undertaking one is imposed or claimed. But the primary undertaking is that a lien shall not be imposed. We are of opinion that the libellants got no lien upon the Clio, and* a fortiori *that the Morganza was free."*

The decision in *U. S.* v. *Carver,* has since been uniformly followed, under various facts, in the following cases: *The Admiral Goodrich* (9th Circ., 1923), 288 Fed., 363; *The Henry S. Grove* (W. D. Wash., 1923), 287 Fed., 247; *The New Rochelle* (N. D., Ohio), 1923, American Maritime Cases, 362; *The Ascutney* (4th Circ., 1923), 289 Fed., 802; *The Awensdaw* (C. C. A. 4th Circ., 1923), 289 Fed., 803; *The Thordis* (E. D., N. Y.), 1923 American Maritime Cases, 581.

Certainly Garmey's position was much less favorable than that of an agent in a foreign port or a master ordering repairs to the vessel abroad. He admitted he had no authority to pledge the credit of the vessel and he was in frequent communication with the American Star Line, Inc. *Record,* p. 19. Consequently, it should not be presumed that the Morse Dry Dock & Repair Company has a maritime lien merely because of Garmey's having placed the order. If it was the duty of repairmen in foreign ports to exercise diligence, certainly at least as rigid a test should be applied

o a repairman in the vessel's home port, which is also the principal place of business of both the agreed owner in possession and the repair yard.

The petitioner in the instant case therefore was required to use reasonable diligence in ascertaining whether the party ordering the supplies had authority to bind the vessel. By the exercise of such diligence it would have learned that the American Star Line, Inc., was without authority to create maritime liens on the steamship *Northern Star* because of the terms of both the agreement for sale and the preferred mortgage covering that ship. Consequently, the Morse Dry Dock & Repair Company is charged by law with notice that neither the American Star Line, Inc., nor any of its representatives could in law create any liens on the vessel.

II. The agreement of sale prohibited the creation of maritime liens on the vessel.

The petitioner in its endeavor to spell out a right to a maritime lien confuses a presumption with an established right. A presumption can be rebutted and, if it is rebutted, the right presumed does not accrue.

If the repair yard has any maritime lien for its bill, it must be because of the presumptions of Subsections P and Q of the *Ship Mortgage Act, 1920.* 41 Stat. 1005. However, these presumptions are qualified by the provisions of Subsection R of the Ship Mortgage Act. This is admitted by the petitioner on page 31 of its brief before this Court when it says "All of these sections clearly refer one to the other, and must be read together."

In the case of the *Northern Star,* the Morse Dry Dock & Repair Company either knew or should have known that

Garmey was without authority to bind the vessel. He not only had no authority from his principal, the American Star Line, Inc., but that company itself had no right to pledge the vessel's credit.

It will be noted that Subsection R specifically mentions an "agreement for sale of the vessel" as a source of limitation upon the authority to bind the vessel. In the case at bar, there is just such an agreement for sale which prohibits the creation of maritime liens on the *Northern Star*. *Record*, pp. 81 to 93.

This agreement of sale provided for the payment of a deposit of Fifty Thousand ($50,000) Dollars on account of said purchase price by the purchaser, the balance to be paid in various installments over a period of five years. *Record*, p. 82. It was also provided that a bill of sale be given the American Star Line, Inc., when 25% of the purchase price had been paid and that the American Star Line, Inc., give notes and a mortgage on the vessel to the United States of America for the balance of the purchase price. *Record*, p. 82.

In order to protect itself after the delivery of the bill of sale, the United States of America provided in the agreement for sale that *from the time of delivery of the bill of sale until the payment of all the notes given by the buyer, and until the performance of all other obligations on the part of the buyer, no lien would be created upon the vessel.*

The particular provisions setting up this limitation are contained in Article 6, subsections (e), (f) and (l), *Record*, pp. 83, 84, 85, 86, which read as follows:

> "6. From the time of delivery by the Seller of the bill of sale of said vessel, and until the payment

in full of the notes to be given by the Buyer, and until the performance of all other obligations of the Buyer hereunder, the Buyer agrees:"

* * * * * * *

"(c) *That the Buyer will not suffer or permit to be continued any lien, encumbrance or charge* which has or might have priority over the mortgage of said vessel to the Seller; but the Buyer will in due course, and in any event within thirty days after the same becomes due and payable, pay, discharge or make adequate provision for the satisfaction or discharge of all lawful claims or demands which, if unpaid, might in equity, in admiralty, at law or by any statute of this or any other nation where said vessel may be navigating or berthed, have such priority over the said mortgage, or might operate as a lien, encumbrance or charge upon said vessel, or cause its detention in port;"

* * * * * * *

"(f) * * * *The Buyer shall* take such other appropriate steps as designated to it by the Seller from time to time or required by the circumstances, as will *give notice to the world* that the Buyer's right, title and interest in the said vessel is subject to the said mortgage and to this agreement, and *that the Buyer has no right, power or authority to suffer or permit to be imposed on or against said vessel any liens* or claims which might be deemed superior to, or a charge against, the interest of the Seller in said vessel."

* * * * * * *

"(l) *That the Buyer will not,* without written consent of the Seller first obtained, make any * * * *pledge* or other transfer of *said vessel* or of any interest therein."

Subsection (3) of Article 6 of the agreement for sale in the very first clause uses substantially the same language construed by this Court in *United States* v. *Carver*, 260 U. S. 482, namely, "That the Buyer will not suffer or permit to be continued any lien, encumbrance or charge * * * ." This language was held by this Court in the *Carver* case to prohibit the creation of any lien. The succeeding words, "which has or might have priority over the mortgage of said vessel to the Seller," still further substantiate this interpretation. The form of mortgage annexed to the agreement for sale was an ordinary mortgage, there being no provision of law at that time for preferred mortgages and any maritime lien would have taken precedence over an ordinary mortgage. Consequently, when the agreement provided that no lien, encumbrance or charge, which might take priority over the mortgage could be created by the buyer, the effect of the provision was to prohibit any maritime liens.

Subsection (e) of Article 6 of the agreement for sale also provided that the buyer should in due course and in any event within thirty days discharge all lawful claims which "might operate as a lien, encumbrance or charge upon said vessel, or cause its detention in port." This is further convincing proof that it was intended by the agreement for sale to keep the vessel clear of all liens.

Subsection (f) of Article 6 of the agreement for sale still further evidences this intent, for it requires the buyer to "give notice to the world that the Buyer's right, title and interest in the said vessel is subject to the said mortgage and to this agreement, and that the Buyer has no right, power or authority to suffer or permit to be imposed on or against said vessel any liens or claims which might

be deemed superior to, or a charge against, the interest of the Seller in said vessel." It will be noted that this clause repeats the fact that the vessel "is subject to the said mortgage and to this agreement" and uses again the language of the charter party construed in the *Carver* case in the provision that the buyer has no right, power or authority "to suffer or permit to be imposed on or against said vessel any liens."

Conclusive evidence of the intent to prohibit the creation of liens is found in subsection (l) of Article 6 of the agreement for sale. That subsection provides "that the Buyer will not, without written consent of the Seller first obtained, make any * * * pledge or other transfer of said vessel or of any interest therein."

Consequently neither the American Star Line nor its agent, Garmey, had the right to impose any lien on the *Northern Star* for the repairs done by the Morse Dry Dock & Repair Company. Such a right was absolutely denied the agreed purchaser in possession by the real owner, the United States of America under the foregoing agreement.

The effect of these prohibitions is not reduced in any way by the petitioner's argument that the presumption is conclusive against the owner. *Petitioner's Brief*, pp. 31 to 33. The fact has been demonstrated that the American Star Line was not the owner of the *Northern Star*, but was merely an "agreed purchaser in possession." Such an "agreed purchaser in possession" is specifically mentioned in Subsection R just before the provision requiring the exercise of diligence in ascertaining the limitations of the right to maritime liens. Consequently, the American Star

Line, Inc. was just such a person as the draftsman had in mind in preparing the act. Moreover, the last part of Subsection R specifically mentions an "agreement for sale" as a source of a limitation against liens.

In these circumstances, the petitioner must be held to be barred from the right to a maritime lien by the provisions of an agreement for sale. Such a holding would not be new to it because the Circuit Court of Appeals for the Second Circuit applied the same doctrine against the Morse Dry Dock & Repair Company in another case besides the *Northern Star,* namely *The Princess Matoika* (1924), 1 F (2d) 233. There the court said at pages 238, 239:

> " * * * And it is our opinion that while the libellant did not know that the Steamship Company was without authority to bind the vessel it might readily have ascertained the want of authority to do so if it had exercised the 'reasonable diligence' in making the inquiry, which it was its duty under the Statute to make. *The libellant* chose to rely upon a statement made to it by an officer of the Steamship Company which had the vessels in its possession but did not ask to see the papers which conferred upon it its right of possession, and it *made no inquiry of the United States Shipping Board or of the Government of the United States from which the Steamship Company acquired whatever rights it had in the ships. If it had made the least effort to ascertain the facts it would have known that the Steamship Company could not create a lien on the vessels.* In choosing to rely solely upon the loose statements made to it by an officer of the Steamship Company it did so at its own risk and must abide the consequences. *The facts were readily ascertainable, the inquiry into the facts was a duty under the*

Statute. And when a duty to make inquiry exists it must appear that the one whose duty it was to inquire prosecuted his inquiry with all the care and diligence required of a reasonably prudent man.

* * * * * * * *

"The principle involved in this case seems to us somewhat analogous to that involved in the cases above considered. In both classes of cases there is the duty to make inquiry and that duty is not discharged by accepting the statement of an interested party without any examination of the title papers which would have disclosed a want of power to create a lien upon the property involved."

The Circuit Court of Appeals for the Fourth Circuit has applied the same doctrine in substantially the same situation as that in *The Princess Matoika.* In *The Moosabee* (1924), 1F (2d) 964, the libellant sued to recover for repairs and supplies furnished to the vessels and relied upon a statement made by the officers of the company ordering the repairs and supplies that the corporation was the owner of the vessels. Judge Woods, writing the opinion for the court, said at page 965:

"The libellant, the P. H. Gill & Sons Forge & Machine Works, assigns errors in the decrees of the District Court dismissing its libels setting up claims against the United States, owners of the Steamship *Morganza* and *Moosabee* for repairs and supplies.

"Both vessels were owned by the United States and operated by the States Steamship Corporation under charter contracts with the Shipping Board containing options of purchase. The contract for the *Morganza* was in writing, with the familiar provision:

" 'The charterers will not suffer nor permit to be continued any lien, encumbrance or charge which has or might have priority over the title and interest of the owner in said vessel.' "

• • • • • • • •

"The affidavits of the officers of the libellant show that they knew the ships had been built by the Shipping Board and possession acquired from it by the States Steamship Corporation. *The absence of any authority of the States Steamship Corporation to place a lien on the vessels would have appeared by any inquiry either of the officers of the States Steamship Corporation or of the Shipping Board or by inspection of the ships' documents; but no inquiry was made.* The cases fall clearly within *The Clio-The Morganza, United States* v. *Carver*, 47, 260 U. S., 482, and *The St. Johns, Colonial Beach Company* v. *Quemahoning Coal Company*, 260 U. S., 707; *Northern No. 44, Deibert Barge-Building Company* v. *United States* (4th Circuit), 289 Fed., 805; *The Princess Matoika, Morse Dry Dock & Repair Company* v. *United States* (2nd Circuit), 1924 A. M. C., 1033; *Standard Oil Company* v. *United States* (4th Circuit), (opinion this day filed); *Frey & Sons, Inc.* v. *United States* (4th Circuit), (opinion this day filed).

"Affirmed."

Certainly, if it was the duty of the libellant in *The Princess Matoika* and *The Moosabee* to ascertain the right, if any, to bind the vessel by inquiring of the corporation ordering the repairs or of the Shipping Board, it was even more so the duty of the petitioner in the case at bar to make inquiry of the American Star Line, Inc., or the Shipping Board, particularly since no representation whatsoever was made as to the right to bind the vessel.

The petitioner may argue that *The Princess Matoika* and *The Moosabee, supra,* are cases of charter sales agreements and are therefore not applicable to the case at bar. However, there is no difference in principle between a charter sales agreement and a conditional sales agreement.

Moreover, it has been specifically held twice by the Circuit Court of Appeals for the Fourth Circuit that the same principle applies to an agreement for sale of a vessel, whose terms were less favorable than those of the agreement covering the *Northern Star.*

Frey & Son, Inc. v. *United States of America* (C. C. A., 4th Circ., Sept. 29, 1924), 1 F (2d) 963.

Standard Oil Co. v. *United States, et al.* (C. C. A., 4th Circ., Sept. 29, 1924), 1 F (2d) 961.

In *Frey & Sons, Inc.* v. *United States of America, supra,* Judge Woods said at page 964:

> "The point is pressed that the following provision of the contract of sale did not forbid a lien for supplies, but on the contrary contemplated that such a lien might be created, which the purchaser undertook to remove within fifteen days:
>
> 'The Buyer shall not suffer to be continued any lien or charge having priority to or preference over the title of the Seller in the vessel, or any part thereof, but will in due course and in any event within fifteen (15) days after the same becomes due and payable, pay or cause to be discharged or make adequate provision for the satisfaction or discharge of all lawful claims or demands which might in equity, in admiralty or at law or pursuant to any statute have precedence over the title of the Seller

as a lien or charge upon the vessel, or any part thereof, or cause the vessel to be released or discharged from any lien therefor, * * * always, however, subject to the condition that the vessel be discharged from any libel, attachment or other detention under process or color of legal authority within fifteen (15) days from the time when same attaches. If the vessel shall be libelled, attached or seized under writ or process in any judicial proceeding, the Buyer shall forthwith notify the Seller in writing of such proceedings and shall forthwith proceed to take such steps as will release the vessel from such writ or process by filing an undertaking, stipulation or otherwise as may be permitted.'

"The argument is that this provision brings the case under the reasoning and decision in the *South Coast* case, 251 U. S., 519, and not under *United States* v. *Carver*, 260 U. S., 482, 489. There may be doubt whether this provision of the contract standing alone forbade the creation of any lien on the vessel by the conditional purchaser; but we think *all doubt is dispelled by another provision of the contract for the sale of the vessel*:

'The Buyer agrees to carry a properly certified copy of this agreement with the ship's papers and to take such other appropriate steps designated to it by the Seller from time to time as required by circumstances as will give notice to the world that the Buyer has no right, power nor authority to suffer or permit to be imposed on or against the vessel any liens or claims which might be deemed superior to or a charge against the interest of the Seller in the vessel.'

"*The contract of sale forbade the creation of a lien on the vessel by the conditional purchaser.* The libellant knew that there was a conditional contract

of sale, and that the purchase money had not been paid, and it was charged with inquiry as to its terms. *The Clio-The Morganza; United States* v. *Carver,* 260 U. S., 482, 489; *The St. Johns, Colonial Beach Company* v. *Quemahoning Coal Company,* 289 Fed., 805; *The Princess Matoika; Morse Dry Dock & Repair Company* v. *United States* (2nd Circuit), 1924 A. M. C., 1033; *The Moosabee, P. H. Gill & Sons, etc.* v. *United States* (4th Circuit), (opinion filed this day); *Standard Oil Company* v. *United States* (4th Circuit), (opinion filed this day)."

Reaffirming this doctrine in *Standard Oil Company* v. *United States, et al., supra,* Judge Woods said at page 961:

"*The Shipping Board delivered the vessels mentioned to the Atlantic, G. & P. S. S. Corporation under identical conditional contracts of sale* dated September 24, 1920, November 5, 1920, January 19, 1921 and February 28, 1921, which contained these provisions:

'The Buyer shall not suffer to be continued any lien or charge having priority to or preference over the title of the Seller in the vessel, or any part thereof, but will in due course and in any event within fifteen (15) days after the same becomes due and payable, pay or cause to be discharged or make adequate provision for the satisfaction or discharge of all lawful claims or demands which might in equity, in admiralty or at law or pursuant to any statute have precedence over the title of the Seller as a lien or charge upon the vessel, or any part thereof, or cause the vessel to be released or discharged from any lien therefor * * *.'

"The contract required the purchaser

'To carry a properly certified copy of this agreement with the ship's papers and to take such other

> appropriate steps designated to it by the Seller from time to time as will give notice to the world that the Buyer has no right, power nor authority to suffer or permit to be imposed on or against the vessel any liens or claims which might be deemed superior to or a charge against the interest of the Seller in the vessel.'
>
> "We have held in *The Moosabee, P. H. Gill & Sons Forge and Machine Works* v. *United States* (4th Circuit), (opinion filed this day), that *these contract provisions forbade the conditional purchaser to place liens on the vessels.*"

It will be noted that the agreement for sale in each of the foregoing cases contained the expression, "the Buyer shall not suffer to be continued any lien or charge * * *," which differs from the expression used in the *Carver* case that the Buyer "shall not suffer nor permit to be continued any lien, encumbrance, or charge * * *." Nevertheless, the Circuit Court of Appeals for the Fourth Circuit held that in view of the other provisions of the agreement for sale, the principle of the *Carver* case was applicable and no liens could be created on the vessels.

In the case at bar, the agreement for sale contains substantially the same expression as that in the *Carver* case, "that the Buyer will not suffer or permit to be continued any lien, encumbrance or charge * * *" (*Record,* 84).

It also contains substantially the same additional provisions which resolved all doubts for the Circuit Court of Appeals for the Fourth Circuit in *Frey & Son, Inc.* v. *United States, supra,* "* * * the Buyer shall take such other appropriate steps as designated to it by the Seller from time to time or required by the circumstances, as will give notice to the world that the Buyer's right, title and interest in the

said vessel is subject to the said mortgage and to this agreement, and that the Buyer has no right, power or authority to suffer or permit to be imposed on or against said vessel any liens or claims which might be deemed superior to, or a charge against, the interest of the Seller in said vessel" (*Record,* 85, 86).

Finally, the agreement for sale in the case at bar contains the further provision:

> "That the Buyer will not, without written consent of the Seller first obtained, make any * * * pledge or other transfer of said vessel or of any interest therein" (fol. 264).

In these circumstances, the *Carver* case is even more applicable to the case at bar, since there is no doubt whatsoever about the meaning of the foregoing provisions of the agreement for sale. The fact that the first provision is almost identical with the clause construed in the *Carver* case, the fact that the second of the foregoing provisions is almost identical with the one that resolved any doubt for the Circuit Court of Appeals for the Fourth Circuit and the fact that the third is virtually conclusive, leave no room for speculation.

Even if the petitioner did not know of the agreement for sale it would be charged with notice of its terms and would be held not to have a lien because of its failure to make inquiry. This was held by Judge Dickinson in the *John Baizley Iron Works* v. *United States,* E. D. Pa., Feb. 7, 1925, 6 F (2d), 25, a case also involving an agreement of sale, in which he said at page 26:

> "There are expressions in the act and in some of the opinions accompanying the rulings made which

are sometimes read to mean that the finding must be made that the inquiry would have resulted in knowledge. This is a misreading of the language of the act and of the opinions. No court is expected to ascribe to itself the gift of prophesy, for no one could foretell what would be the result of an inquiry. What would have been the result of the inquiry is not the point. The point is that inquiry must be made, if there was the absence of the power to pledge to be learned. If there was nothing to deny the power, this provision of the act has no application. *When there is, as here, an agreement of sale denying the power, inquiry must be made.* If an inquiry had been made, but nothing learned, then the finding would become one of its adequacy. The person ordering the repairs here had (barring the provisions of the agreement of sale), ample authority to bind the owners and the vessel.

"The libellant has in consequence a prima facie right of lien. This right, however, is qualified by the act of Congress by being subjected to the duty, before it becomes an absolute right, of inquiry into the existence of any agreement which denies the right. *The libellant here rested upon this primary qualified right, and made no inquiry into the existence of an agreement, thereby assuming the risk of its existence. Such an agreement did exist and it is destructive of the right of lien, which would otherwise exist. The cause is brought within the operation of two propositions. One is that, in the absence of a stipulation against liens, the libellant has a right of lien; the other is that, in the presence of such a stipulation and the absence of any inquiry into its existence, there is no right of lien. We look upon this cause as ruled by the Clio Case, U. S.* v. *Carver, supra.* The respondent, in addition to resting upon the absence of inquiry, introduced evidence of actual

knowledge of the existence of the stipulation against liens. Into this we have not gone."

The petitioner cannot brush aside the effect of this overwhelming line of authorities by the statement, *Petitioner's Brief*, page 34, that "If such an agreement ever existed, it was superseded and terminated by the execution of an absolute bill of sale and the giving of a mortgage."

In the first place, there can be no question about the existence of the agreement for sale because the petitioner stipulated that the agreement was duly executed and that a duplicate original was on file at the offices of the American Star Line, Inc. and another duplicate original was kept on file at the Shipping Board. *Record*, p. 80.

Moreover, the agreement for sale was not terminated by the giving of the bill of sale for the possession of the vessel by the American Star Line has been demonstrated to have been only conditional. It has been held repeatedly that despite the giving of a bill of sale the holder's title can be shown to be only conditional. *Morgan's Assignees* v. *Shinn* (1872) 82 U. S. 105; *Davidson* v. *Baldwin*, C. C. A. 6th 1897, 79 Fed. 95; *Everett* v. *United States*, C. C. A. 9th, 284 Fed. 203.

It should be especially noted that the agreement for sale particularly provided for the continuation of the prohibition against liens after the giving of the bill of sale. All of the restrictions against liens contained in Article 6 are preceded by the preamble, *Record*, p. 83:

> "From the time of delivery by the Seller of the bill of sale of said vessel, and until the payment in in full of the notes to be given by the Buyer, and until the performance of all other obligations of the Buyer hereunder, the Buyer agrees: * * *"

This provision leaves no doubt whatever that the restriction was intended by the parties to prevail even after the giving of the bill of sale. The fact that the Constitution of the United States guarantees the liberty of contract is sufficient answer to the astounding statement of the petitioner that "no agreement between the parties can change their status in law". *Petitioner's Brief*, p. 35.

The same contentions, made by the Morse Dry Dock & Repair Company in this case, against the application of the restrictions upon maritime liens after the giving of the bill of sale were made by an alleged lienor in the case of the *American Star*, decided by the Circuit Court of Appeals for the Third Circuit on March 1, 1926, and reported as yet only in 1926 American Maritime Cases 516.

That was a case involving identically the same type of agreement made between the same parties as the agreement for sale on the *Northern Star*. In writing the opinion for the Court, Judge Davis said at p. 520:

> "Does the appellant have a lien for the coal and supplies furnished second to the lien of the mortgage? The presumption is that a lien arises when necessary supplies are furnished to a vessel on the order of the owner or master and it shall not be necessary to allege or prove that credit was given to the vessel. Any one who denies the existence of such a lien has the burden of establishing the contrary. Section P of the Ship Mortgage Act of June 5, 1920; *Yankee*, 233 Fed. 919. The agreement of sale contained the following provision:
>
> 'That this agreement will be carried as part of the ship's papers; and that the Buyer shall take such other appropriate steps, as designated to it by the Seller from time to time or required by the circum-

stances, as will give notice to the world that the Buyer's right, title and interest in the said vessel is subject to the said mortgage and to this agreement, and that the Buyer has no right, power or authority to suffer or permit to be imposed on or against said vessel any liens or claims which might be deemed superior to, or a charge against, the interest of the Seller in said vessel.'

An inquiry by the appellant would have disclosed the information it contained. The sale had been completed and the agreement in a sense, as appellant contends, 'had ceased to be operative before the supplies were furnished' but it nevertheless showed that the Seller still had an interest in the vessel and that the Buyer had 'no right, power or authority to suffer or permit to be imposed on or against said vessel any liens or claims' which might be deemed superior to the interest of the Seller; and this very claim is so deemed by the libellant and shows the wisdom of incorporating the provision into the agreement.''

The Court concluded at page 521:

> ''It was the duty of the appellant to exercise reasonable diligence to ascertain whether the master had authority to impose a lien on the vessel, and if it had done its duty, it would have ascertained that both the agreement and mortgage prohibited him from doing so.''

The foregoing case is directly in point with the case at bar and the remarks of Judge Davis entirely dispose of the specious theories advanced by the petitioner to circumvent the agreement for sale.

III. The mortgage prohibited the creation of maritime liens on the vessel.

In addition to the restrictions against liens contained in the agreement for sale, there are similar prohibitions in the mortgage.

It will be recalled that the original of this mortgage was on file at the Custom House in the very port where the repairs were made, that a certified copy was on board the vessel while the repairs were being made and that Garmey, who ordered the repairs, knew about the mortgage.

It is also noteworthy that Garmey had had previous dealings with the Morse Dry Dock & Repair Company and particularly with Murray, the general superintendent and Hallock, the assistant general superintendent. *Record*, pp. 17, 18. It hardly seems possible that in the course of these dealings neither Murray nor Hallock learned anything about there being a mortgage on the *Northern Star*.

Although both Murray and Hallock were material witnesses, the petitioner failed to produce them upon the trial. *Record*, pp. 12, 22. It is well established that the failure to produce material witnesses or important evidence gives rise to the presumption that their testimony or the effect of the evidence would be unfavorable to the party failing to produce them.

The following are some of the authorities sustaining the rule: *The New York*, 175 U. S., 187, 204; *Runkle* v. *Burnham*, 153 U. S., 216, 228; *The Colon*, 241 Fed., 592, 593; *The Bertha F. Walker*, 220 Fed., 667, 669; *Consolidated Coal Co.* v. *Knickerbocker Steam Towage Co.*, 200

Fed., 840, 845; *Norquet* v. *Paramount Worsted Mills,* 177 *Fed.,* 970, 975; *The Degama,* 150 Fed., 323, 324; *Choctaw & M. R. Co.* v. *Newton,* 140 Fed., 225, 238; *The Georgetown,* 135 Fed., 854, 859; *American Bell Tel. Co.* v. *National Tel. Mfg. Co.,* 109 Fed., 976, 1018; *The Alpin,* 23 Fed., 815, 816; *The Fred M. Laurence,* 15 Fed., 635.

Consequently the presumption is justified in the case at bar that if Murray and Hallock had been called to testify they would have been obliged to admit that the Morse Dry Dock & Repair Company knew about the mortgage.

Whether or not the petitioner actually knew about the mortgage, it is fully charged with notice of all its terms under the circumstances of this case.

The creation of maritime liens at any time was expressly prohibited by the following provisions of the preferred mortgage. *Record,* pp. 40, 41, 42:

"Article I.

Particular Covenants of the Party of First Part.

The party of the first part, the American Star Line, Inc., covenants and agrees as hereinafter in this Article set forth;"

* * * * * *

"Section III. *Not to suffer nor permit to be continued any lien,* encumbrance or charge which has or might have priority over this mortgage of the vessel to the party of the second part; * * *"

* * * * * *

"Section VI. To carry a properly certified copy of this mortgage with the ship's papers; and to take

> such other appropriate steps, as designated to it by the party of the second part from time to time or required by the circumstances, as will *give notice to the world* that the party of the first part's right, title and interest in the vessel is subject to this mortgage, and that *the party of the first part has no right, power nor authority to suffer or permit to be imposed on or against the vessel any liens* or claims which might be deemed superior to or a charge against, the interest of the party of the second part in the vessel."

There can be no doubt that these provisions expressly prohibit the creation of liens on the *Northern Star*. Otherwise they would not require the giving of notice by the American Star Line, Inc. to the world that it "has no right, power nor authority to suffer or permit to be imposed on or against the vessel any liens or claims which might be deemed superior to or a charge against, the interest of" the United States of America in the vessel.

The American Star Line, Inc., at the best, was in the position of a conditional vendee or agreed purchaser in possession, for, although the United States of America through the Shipping Board had given it a bill of sale, conveying title to the vessel, at the same time it had procured from the American Star Line, Inc., the aforesaid mortgage, which gave the United States of America the right to retake possession of the steamer in the event of a default by the American Star Line, Inc., in the making of further payments on the purchase price of the vessel. This is shown by the following provisions of the mortgage, *Record*, pp. 43, 44:

"ARTICLE II.

DEFAULT.

SECTION I. In case any one or more of the following events herein termed events of default, shall happen, * * * then and in each and every case the party of the second part thereupon may:

* * * * * * *

(c) Retake the vessel wherever the same may be found, and hold, lease, charter, operate or otherwise use the vessel for such times and upon such terms as the party of the second part may deem to its best advantages;

(d) Retake the vessel wherever the same may be found and sell the same free from any claim by the party of the first part in law, in equity, in admiralty, or by statute, * * *

* * * * * * *

SECTION II. When any right to retake the vessel shall accrue, the party of the second part may retake the same wherever the same may be found without prior demand and without legal process, and for that purpose may enter upon any dock, pier or other premises where the vessel may be, and the party of the second part may take possession of the vessel upon the high seas or in any port, harbor or other place; * * *"

The repairs on the *Northern Star* were ordered by a marine engineer and surveyor who, it is conceded, was authorized by the American Star Line, Inc., to order the repairs, but had no authority to pledge the credit of the vessel. Although it is doubtful whether an order for

repairs given by a consulting engineer engaged by a conditional vendee would come within Subsection "P" or Subsection "Q" of the Ship Mortgage Act, even if it did, it would be subject to the provisions of Subsection "R" (41 Stat. 1005):

> "• • • but nothing in this section shall be construed to confer a lien when the furnisher knew, or by exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, agreement for sale of the vessel, or for any other reason, the person ordering the repairs, supplies, or other necessaries was without authority to bind the vessel therefor."

It has been previously shown that Subsection "R" qualifies Subsections "P" and "Q".

There can be no doubt that the mortgage falls within the clause "or for any other reason" contained in Subsection R as a source of limitations upon the creations of liens. In the first place, Subsection R is part of Section 30 of *The Merchant Marine Act, 1920*, Act of Congress 1920, Ch. 250, 41 Stat. 988, 1005. Section 30 provides in Subsection A "That this section may be cited as the 'Ship Mortgage Act of 1920' ". 41 Stat. 1000.

It would be preposterous to say that a mortgage is not included in the expression "or for any other reason" contained in the clause "a charter party, agreement for sale of the vessel, or for any other reason" when the very subsection embracing that provision is part of an act bearing the word "mortgage" in its title.

In the second place, under the *ejusdem generis* rule a mortgage would be included in the clause "for any other reason" following as it does the expression "agreement

for sale of the vessel", particularly, since a mortgage is usually given pursuant to an agreement for sale. In fact, the American Star Line, Inc. was required by the agreement of sale to give the mortgage in this instance. *Record*, 82.

Since Subsection R is by its terms made to apply to charter parties, which are not recorded, it is quite consistent and reasonable to apply it to a mortgage recorded at the Customs House of the vessel's home port. A recorded instrument is more properly the basis of notice than an unrecorded one.

Viewed from any angle, a written instrument duly executed between the seller and the buyer such as a mortgage is as good an "any other reason" for the prohibition against liens as could be found.

The mortgage was specifically held to come within that clause by the District Court in the case at bar when it said, *Record*, pp. 63, 64:

> "Under the law as hereinbefore quoted the libellant could not acquire a lien if it knew or by exercise of reasonable diligence could have ascertained that 'for any other reason' the person ordering the repairs, etc., was without authority to bind the vessel therefor.
>
> "The libellant claims that this does not apply to the owner but I cannot agree with that claim because the use of the words 'for any other reason' after the words 'a charter party, agreement for the sale of the vessel' show that they are to be construed broadly, and *much stronger reasons exist to limit the power of a corporation to bind a vessel and create maritime liens thereon where it has purchased the same and given a large purchase money mortgage, than in the case where there has been an agree-*

ment to sell a vessel which sale is not yet consummated.

"It would also seem to me that much less was required of libellant in this case where also the information could be acquired from public (*fol.* 135) *records than is required in case of a charter party which is not so recorded.*

"The terms of Subsection R seem to me to clearly show the intention to include the owner of the vessel among those who by their own agreements may be prohibited from binding the vessel because it says 'Nothing in this section shall be construed to confer a lien', which shows plainly that the prohibition referred to is not limited to any class named therein, or in any particular subsection, but it is to be construed in connection with the whole of Section 30, including of course Subsections P and Q. This also further appears to be the true construction because when it was intended to refer only to a particular subsection, it was done as appears early in Subsection R, where the word 'section' was not used but it says 'specified in Subsection Q'.

"This construction is also strengthened by the fact that Subsection R specifies 'the terms of * * * agreement for sale of the vessel' as a source from which it may be learned that there is no authority to bind the vessel, because the terms of agreement for the sale of the vessel would bind the seller as well as the purchaser, and if the owner who was making the sale remained in possession, he would be the one who would by the terms of the agreement be deprived of authority to bind the vessel.

"Holding therefore as I do that by their terms of said mortgage the American Star Line, Inc., was prohibited from creating a maritime (*fol.* 136) *lien for the repairs made by the libellant, and that such prohibition comes under the term 'for any other*

reason' as set forth in said Subsection R, there can be no doubt that had libellant exercised reasonable diligence, it could have ascertained the fact, because inquiry at the office of the American Star Line, Inc., the records of the Collector's Office in the Custom House, both in New York City, of Mr. Garmey, or of the captain or officer in charge of the ship, would have furnished libellant with complete information.

"No evidence was offered to show that any inquiry was made and no one connected with the libellant whose duty it was to make such inquiry was produced, and therefore I find that no such inquiry was made, and under the terms of the statute the libellant did not acquire a maritime lien on said vessel for the making of such repairs.

"*United States* v. *Carver,* 1923 A. M. C. 47;
"*The Buckhannon,* 1923 A. M. C. 645;
"*The Admiral Goodrich,* 288 Fed. 362;
"*The Ascutney,* 289 Fed. 802;
"*The Awensdaw,* 1923, A. M. C. 505;
"*The Northern No. 44,* 1923 A. M. C. 622."

The same holding was made by the District Court of New Jersey in *The American Star,* decided by Judge Lynch May 29, 1924, as yet reported only in 1924 American Maritime Cases 1064. There the Court said at pages 1066 and 1067:

"The libellant, in November, 1920, could, by the exercise of reasonable diligence, have ascertained that 'because of the terms of the * * * agreement for sale of the vessel or for any other reason, the person ordering the * * * supplies * * * was without authority to bind the vessel.' *The slightest sort of inquiry on the part of the libellant in this case would have revealed the existence of this 'preferred mortgage.' And a preferred mortgage, in my opin-*

ion, falls within the meaning of the words 'or for any other reason.' As to that, I quote from the very recent opinion of District Judge Campbell in the case of the *Northern Star,* 295 Fed.

'Under the law as hereinbefore quoted the libelant could not acquire a lien, if it knew or by exercise of reasonable diligence could have ascertained that "for any other reason" the person ordering the repairs, etc., was without authority to bind the vessel therefor. The libelant claims that this does not apply to the owner, but I cannot agree with that claim, because the use of the words "for any other reason" after the words "a charter party, agreement for the sale of the vessel," shows that they are to be construed broadly, and much stronger reasons exist to limit the power of a corporation to bind a vessel and create maritime liens thereon, where it has purchased the same and given a large purchase-money mortgage, than in a case where there has been an agreement to sell a vessel, which sale is not yet consummated.'

"With the views of Judge Campbell, I concur.

"The libel will be dismissed."

In affirming Judge Lynch's decision, the Circuit Court of Appeals for the Third Circuit after quoting Subsection R said in *The American Star, supra,* 1926 A. M. C. 516 at pages 520 and 521:

"This language did not leave the person furnishing supplies to rest on presumption, but called upon him to exercise reasonable diligence to ascertain whether or not because of the agreement of sale, 'or for any other reason,' the master was without authority to bind the vessel. *The existence of the preferred mortgage is the 'any other reason' why the master was without authority to bind the vessel for sup-*

plies and thus jeopardize the interest of the seller. Northern Star, 1924 A. M. C. 136, 295 Fed. 366.

"The mortgagor in the mortgage itself agreed 'not to suffer nor permit to be continued any lien, encumbrance or charge which has or might have priority over this mortgage of the vessel to the party of the second part.' This means that the mortgagor would not suffer any lien to be created nor permit one to be continued. *It was the duty of the appellant to exercise reasonable diligence to ascertain whether the master had authority to impose a lien on the vessel, and if it had done its duty, it would have ascertained that both the agreement and mortgage prohibited him from doing so.* It is therefore responsible for what a diligent inquiry would have revealed. *Moosabee, Gill* vs. *U. S.,* 1924 A. M. C. 1283, 1 F. (2d) 964; *Frey & Son Inc.* vs. *United States,* 1924 A. M. C. 1281, 1 F. (2d) 963; *Hoxie,* 1923 A. M. C. 937, 291 Fed. 599; *Standard Oil Co.* vs. *United States,* 1924 A. M. C. 1276, 1 F. (2d) 961; *Clio—Morganza, United States* vs. *Carver,* 1923 A. M. C. 47, 260 U. S. 482."

The preferred status of the mortgage is not inconsistent with restrictions against liens because there are some liens that might be superior to the preferred mortgage lien. *Subsection M of Ship Mortgage Act,* 41 Stat. 1004. In addition to the protection of a preferred mortgage, a mortgagee has the right to protect himself against any liens by requiring the mortgagor to agree not to create any.

That was what the Shipping Board did in the case of the *Northern Star* mortgage and the contractual provisions of that mortgage must be enforced. Hence the Morse Dry Dock & Repair Company was barred from having a maritime lien against the *Northern Star* by the terms of the mortgage as well as by the terms of the agreement for sale.

IV. Even if the contentions of the Morse Dry Dock & Repair Company are fully accepted, they merely confirm the fact that the petitioner cannot have a maritime lien on the vessel.

The petitioner lays great stress in its brief before this Court on its contention that the mortgage on the *Northern Star* is not a preferred mortgage. It also made the point that the mortgage does not prohibit all liens but only liens that might have priority over the mortgage.

In the first place, it is well established that every maritime lien takes priority over an ordinary mortgage. *The John Jay,* 1854, 17 How. (58 U. S.) 399. Therefore, if the mortgage on the *Northern Star* were only an ordinary mortgage the prohibitions contained in it against the creation of any incumbrance that might take priority over the mortgage mean that no maritime lien whatever can be created on the vessel.

In the second place the petitioner admits in its brief before this Court that the mortgage is valid even if it is not a preferred mortgage. *Petitioner's Brief,* p. 22. As a valid contract its terms must be enforced, including the provisions against the creations of liens. The lack of such preferred status would not invalidate the restrictions against maritime liens.

Even if these provisions are given the reduced effect suggested by the petitioner, they, nevertheless, are sufficient to prevent the creation of any maritime lien whatever, because any maritime lien would come ahead of an ordinary mortgage. Therefore none can be created under that prohibition.

Thus, the petitioner finds itself in a dilemma, for, even the interpretation most favorable to it, nevertheless bars it from a maritime lien.

SECOND POINT.

SINCE THE MORSE DRY DOCK & REPAIR COMPANY HAS NO MARITIME LIEN AGAINST THE "NORTHERN STAR", THE MORTGAGEE IS ENTITLED TO THE PROCEEDS OF SALE OF THE STEAMER.

Putting aside for the time being the question whether the mortgage has preferred status, it nevertheless entitled the holder Luber to the proceeds of sale of the *Northern Star.*

Even as an ordinary mortgage, it comprises at least a common law lien against the fund in the registry of the Court, whereas the petitioner, having no lien whatever, cannot in any event be paid out of that fund. His claim unsupported by any lien is merely a personal debt of the American Star Line, Inc.

These principles are established by the decisions in *The J. E. Rumbell* (1892), 148 U. S. 1; and *The Rupert City* (D. C. Wash. N. D. 1914), 213 Fed. 263.

In *The J. E. Rumbell* (1892) 148 U. S. 1, a case in which a lien for repairs in the vessel's home port given by state statute was given preference over an ordinary mortgage, Justice Gray said at page 15:

> "An ordinary mortgage of a vessel, whether made to secure the purchase money upon the sale thereof, or to raise money for general purposes, is not a maritime contract. A court of admiralty, therefore, has no jurisdiction of a libel to foreclose

it, or to assert either title or right of possession under it. *The John Jay,* 17 How. 399; *The Eclipse,* 135 U. S. 599, 608. But it has jurisdiction, after a vessel has been sold by its order, and the proceeds have been paid into the registry, to pass upon the claim of the mortgagee, as of any other person, to the fund, and to determine the priority of the various claims, upon petitions such as were filed by the mortgagees and the materialmen in this case. *The Globe* 3 How. 568, 573; *The Angelique* 19 How. 239; *The Lottawanna* 2i Wall. 558, 582, 583; Rule 43 in Admiralty."

The Rupert City (D. C. Wash. N. D., 1914), 213 Fed. 263, was a case in which questions as to priority between claims supported by maritime liens, claims supported by non-maritime liens including a mortgage, and claims not supported by any lien arose in connection with the distribution of proceeds of sale of a vessel in the registry of the court. There Judge Neterer said at page 266:

"It does not follow, as contended, however, that the mortgagee may not intervene and defend against the establishment of maritime liens against the vessel. These would deplete the fund on which he must rely, as the vessel when sold is discharged of his lien, and the mortgagee has a claim only upon the proceeds of sale. *Schuchardt* v. *Babbage* 19 How. 239, 15 L. Ed. 625; *The H. N. Emilie* (D. C.) 70 Fed. 511; *The Advance* (D. C.) 63 Fed 704; *The Old Concord,* Fed. Cas. No. 10,482; *The Mary Anne,* Fed. Cas. No. 9,195.

"(2) When the vessel is sold and the fund is in the registry of the court, after the payment of all maritime claims, the court will order the payment of such non-maritime liens as have been established, in

> the order of their priority. Claims not supported by liens cannot be paid out of the fund, since they are against the owner personally, and not against the fund. *The Advance* (D. C.) 63 Fed. 704, 706."

A similar holding was made by Judge Morrow in *The Katie O'Neil* (D. C., N. D. Cal., 1894) 65 Fed. 111, 113.

Since the Morse Dry Dock & Repair Company cannot be paid its claim from the fund in Court by reason of its not having a maritime lien, the holder of the mortgage Luber is entitled to payment of his claim out of the proceeds of sale of the vessel. However, his claim of over $1,000,000 greatly exceeds the total proceeds of sale. Consequently, he is entitled to the entire fund in the registry of the Court.

THIRD POINT.

EVEN IF THE MORSE DRY DOCK & REPAIR COMPANY HAD A MARITIME LIEN AGAINST THE NORTHERN STAR THE PREFERRED MORTGAGE LIEN WOULD HAVE PRIORITY.

However, the petitioner's contention, that the mortgage is not a preferred mortgage, is not correct. It will be shown hereinafter that the mortgage should be given preferred status as of September 23, 1920 and that there cannot be even the shadow of a doubt that it has such status as of June 27, 1921. That being so, its holder is entitled to priority over the claim of the Morse Dry Dock & Repair Company, even assuming the latter has a maritime lien, unless the petitioner's claim constitutes a preferred maritime lien within the meaning of the Ship Mortgage Act.

At the outset it should be borne in mind that the World War gave American Shipping a tremendous impetus and an

almost national desire was stimulated to restore the American Merchant Marine to the proud basis it was on in the days of the clipper ships. In order to achieve such a restoration it was necessary to provide stable security to attract the large amount of capital required. Bankers, trust companies, large insurance companies and any other corporations with funds to invest were not disposed to invest their money in ships unless their investments could be secured by mortgages resembling in stability the mortgages on real property.

It was this desire to improve the security furnished by a ship mortgage that led to the passage of the Ship Mortgage Act. The ordinary ship mortgage of the past had been found to be very inadequate as security for large investments because of prior maritime liens that were likely to accrue after the giving of the mortgage and the cost of construction of vessels during and immediately after the World War mounted so high that few could be built without corporate investment. Such investment had to be adequately protected and the Ship Mortgage Act was intended to give that protection.

Another element that led to the passage of the Ship Mortgage Act was the fact that the close of the World War left the United States with large merchant marine tonnage of all classes on its hands. The opinion was general, that it was undesirable for the Government to continue to operate this tonnage for any longer period than would be required to sell the vessels to private owners with a prospect of their being operated privately as part of the merchant marine of the United States. It was obvious that such sales by the Government could not be accomplished

within a reasonable time unless some system were devised of part payment in cash with the balance of the purchase prices satisfactorily secured by adequate mortgages on the vessels.

Consequently the Ship Mortgage Act was passed with the principal purpose in view of protecting the mortgagee as the best means of building up the American Merchant Marine. This is conclusively shown by the title of the *Merchant Marine Act, 1920,* Act of Congress of 1920, ch. 250, 41 Stat. 988, of which the Ship Mortgage Act comprises Section 30. It is entitled "An Act to Provide for the Promotion and Maintenance of the American Merchant Marine, to Repeal Certain Emergency Legislation, and Provide for the Disposition, Regulation, and Use of Property Acquired Thereunder, and for Other Purposes."

It is no exaggeration to say that since that time billions of dollars have been invested by the Government and private corporations in ships in reliance upon the security of preferred mortgages.

The *Northern Star* is a good example. The purchase price in the agreement of sale between the United States and the American Star Line, Inc. was $215 per deadweight ton on the 7550 deadweight tons of the vessel, *Record,* p. 82, which amounts to approximately $1,623,250. The Government took back a mortgage of $1,217,437.50 after the payment of part of the purchase price. Even at the tremendously reduced values of steamers resulting from the slump in the shipping generally the last five years, Luber invested $117,000 when he purchased the mortgage from the Shipping Board. *Record,* p. 95.

The foregoing facts are important in connection with the interpretation of the mortgage on the *Northern Star.*

Although Congress unquestionably intended to afford the mortgagee every protection possible, it went about this purpose somewhat imperfectly so far as the language of the act is concerned. This is shown in some measure by the contention made by the petitioner at page 25 of its brief that the endorsement is to be made before the mortgage is recorded. It is true that Subsection D (a) (2) is susceptible to this interpretation. 41 Stat. 1001. Yet Subsection C states that a mortgage is not even valid until it is recorded. 41 Stat. 1000. This section is a reenactment with some changes of Revised Statutes, Section 4192. (Act of July 20, 1850, ch. 27, s1, 9 Stat. 440.) But in reenacting that statute Congress changed the word "unless" to "until". This change shows clearly that validity was intended to be withheld from even an ordinary mortgage until it was recorded. Under Subsection D (a) a mortgage must first be valid as an ordinary mortgage before it can become a preferred mortgage. Consequently, the recordation must be the first step taken in the entire process of creating a preferred mortgage.

Therefore, subdivision (a) (2) of Subsection D is inconsistent with Subsection C of the same act and the latter would probably be held to prevail. This is one of the most obvious imperfections of the act, which are due perhaps to legislative illustration of the old adage that too many cooks spoil the broth. A number of legislative draftsmen took a hand in preparing what finally became the Ship Mortgage Act and the result is not all that could be desired.

A more serious defect of the Ship Mortgage Act lay in its provisions concerning the documentation of vessels.

These provisions coupled with a number of decisions of the Courts created a situation in which considerable doubt arose as to what port should properly be the home port of a vessel. Some contended quite properly that under the old decisions prior to the Act, the home port must be a port in the state under whose laws the corporation owning the vessel is organized. Others contended just as stoutly that a corporation could register the vessel with its principal place of business as her home port, regardless of where the corporation was organized, and a number of preferred mortgages were actually placed on vessels documented in the latter type of home ports.

This led to decisions declaring invalid preferred mortgages, which were recorded at home ports other than those in the states in which the owner corporation was domiciled and which were recorded during a hiatus in the redocumentation of the steamer following her sale. *The Lincolnland,* 295 Fed. 358, 363; *The Susanna,* C. C. A. 4th, 1924, 2 F (2d) 410; *The Bergen,* 7 F (2d) 379.

To remedy this situation Congress passed the *Home Port Act* of February 16, 1925, ch. 235, 43 Stat. 947.

In that Act, Congress specifically validated the mortgages held invalid. It also validated the home ports now shown in the documents of any vessel of the United States. The Act provides in Section 3:

> "Sec. 3. *All conveyances and mortgages* of any vessel or any part thereof, and all documentations, recordations, indorsements, and indexing thereof, and proceedings incidental thereto heretofore made or done, *are hereby declared valid to the extent they would have been valid if the port or ports at which said vessel has in fact been documented from time*

> *to time had been the port or ports at which it should have been documented in accordance with law; and this section is hereby declared retroactive so as to accomplish such validation*: *Provided*, that nothing herein contained shall be construed to deprive any person of any vested right."

Section 5 of the same Act provides:

> "Sec: 5. All such provisions of the Navigation Laws of the United States and of the Ship Mortgage Act, 1920, otherwise known as Section 30 of the Merchant Marine Act, 1920, as are in conflict with this Act are hereby amended to conform herewith."

The portions of the Home Port Act making the validation retroactive demonstrate clearly the intent of Congress to protect the mortgagee at almost any cost.

I. The mortgage on the Northern Star has preferred status as of September 23, 1920, the date when a certified copy was placed on board the vessel with the ship's papers.

The Ship Mortgage Act was enacted on June 5, 1920. The mortgage on the *Northern Star* was executed on August 9, 1920, only a little more than a month after the passage of the act. *Record*, p. 46.

The Act provides that the Secretary of Commerce is authorized to make such regulations in respect to the recording and endorsing of mortgages covering vessels of the United States as he deems necessary to the efficient execution of the Act, Subsection W, 41 Stat. 1006. It is obvious that in the period of less than a month with no prior expe-

rience of a similar American act to go by, the Secretary of Commerce could not promulgate regulations for the various Collectors of Customs by the time that the *Northern Star* mortgage was presented to the Collector at New York for recordation and endorsement.

The *Northern Star* mortgage as a matter of fact was presented to the Collector at New York two days after its execution, namely, on August 11, 1920. *Record*, p. 9. He naturally did what he had been accustomed to doing for many years; namely, he recorded the mortgage. But, the ship being at sea the thought apparently did not occur to him again of endorsing it on the ship's papers until he was reminded by the regulations finally issued in June, 1921 that he should also have endorsed the mortgages on the ship's papers.

The Ship Mortgage Act required the Collector of Customs to make the endorsement on the ship's papers, Subsection D, Subdivision (d), 41 Stat. 1001. The same Subdivision provided that "no clearance shall be issued to the vessel until such endorsement is made". Since it is the duty of the Collector of the Port to furnish or refuse clearance to vessels, the latter provision still further confirmed the obligation upon him to make the endorsement. Finally, the Act imposes a penalty on him if any person suffers damage by entering into a contract upon the credit of a vessel, on which the Collector has failed to properly perform any duty required of him under the provisions of the Ship Mortgage Act. Subsection J (c), 41 Stat. 1003.

In the face of the foregoing provisions, the Shipping Board probably assumed, as indeed it was justified in doing, that the Collector would attend to the endorsement of the mortgage on the ship's papers. It is a fact that the

mortgage was sold by the Shipping Board to Luber for $117,000 on the representation that it was a preferred mortgage and it was not until after the mortgage had been foreclosed that either the Shipping Board or Luber learned that the Collector had not made the endorsement on the ship's papers until June 27, 1921.

It is a further provision of the Ship Mortgage Act that the Collector of Customs upon recording a preferred mortgage shall deliver two certified copies to the mortgagor, who shall place one copy on board the mortgaged vessel and cause it to be kept with the ship's papers and exhibited by the master whenever request is made of him. *Subsection E*, 41 Stat. 1001, 1002.

The Collector of Customs did give the mortgagor of the *Northern Star*, the American Star Line, Inc., the required certified copies of the preferred mortgage upon recordation of it, but the vessel was at sea at that time. *Record*, 61, 95. It is likely that the fact of the steamer being at sea contributed to the collector's oversight in not endorsing the mortgage on the ship's papers until June, 1921. At any rate, it was not possible for the mortgagor to place the certified copy with the ship's papers until the vessel arrived again in an American port on its voyage from Stockholm. However, immediately on the arrival at Norfolk of the *Northern Star* from Stockholm, the mortgagor placed a certified copy of the mortgage with the ship's papers and instructed the captain to exhibit it to anyone on request. *Record*, pp. 61, 95, 30 to 32, 26, 27, 50, 51. This certified copy remained with the ship's papers up to the time the *Northern Star* was sold by the marshal. *Record*, pp. 61, 30.

It is especially noteworthy that the Ship Mortgage Act provides for the inflicting of a penalty upon the mortgagor if he fails to comply with the requirements of Subsection J (c), 41 Stat. 1003, in addition to the penalty to be inflicted upon the Collector for any breach of the Act's requirements. But, nowhere in the Act is there any provision for imposing a penalty upon the mortgagee. This still further confirms the intent of Congress not to penalize the mortgagee. Indeed, the mortgagee by the very nature of things is powerless to alter the situation and compel the mortgagor or the Collector to perform his duties. *Record*, p. 97.

The situation, therefore, with respect to the *Northern Star* mortgage was that the mortgagee was not guilty of any fault and neither was the mortgagor. If the failure to endorse the mortgage on the ship's papers was the fault of anyone, it was that solely of the Collector of Customs.

The petitioner contends that there is no occasion to apply principles of statutory construction in the case at bar and maintains that the provisions of Subsection D are clear and unambiguous. A careful reading of Subdivision (a) of Subsection D, however, will show that it is well nigh meaningless.

It will be noted that Subsection D (a) begins as follows, 41 Stat. 1000, 1001:

> "A valid mortgage which, (sic) at the time it is made includes the whole of any vessel of the United States of 200 gross tons and upwards, shall in addition have, in respect of such vessel and as of the date of the compliance with all the provisions of this subdivision, the preferred status given by the provisions of Subsection M, if——".

The placing of the comma after the word "which" in the first line makes a parenthetical clause of the expression "at the time it is made includes the whole of any vessel of the United States of 200 tons and upwards". With that descriptive and therefore unimportant parenthetical clause omitted, Subsection D (a) reads "A valid mortgage which shall in addition have, in respect to such vessel and as of the date of the compliance with all the provisions of this subdivision, the preferred status given by the provisions of Subsection M, if——". Since the remainder of the subdivision furnishes no verb for the noun "a valid mortgage" in the first line, the entire Subdivision (a) is absolutely meaningless and yet that is exactly what Congress enacted.

The very rules of statutory construction, on which the petitioner relies so heavily, make it impossible for this Court to put the comma at another place, so as to give Subsection D some revised meaning. It is no more possible to validate an invalid legislative enactment by judicial decision than it is to invalidate a valid act by judicial decision and the remedy, if any is necessary, which is denied, is an amendment by Congress such as the Home Port Act, *supra*. The Act has to be construed as it stands and, as it stands, Subdivision (a) of Subdivision D is an enigma.

Fortunately, the remaining provisions of the Ship Mortgage Act carry out the intent of Congress and make subdivision (a) of Subdivision D unnecessary. Subdivision (b) of Subsection D is clear in its provision that any mortgage which complies with the conditions of the subsection shall be called a "preferred mortgage". Subsection (c) of Subsection D gives the details as to the form of the

endorsement. Subdivision (d) of Subsection D gives the requirements as to how the endorsements shall be made and Subdivisions (e) and (f) contain provisions as to special types of endorsements. 41 Stat. 1000, 1001.

Subsections K, L, M and N are the essential provisions of the Ship Mortgage Act providing, as they do, that a preferred mortgage shall constitute a maritime lien and setting forth, as they do, the priority given a preferred mortgage lien and the procedure for enforcement of it. 41 Stat. 1003, 1004.

Consequently, even when Subdivision (a) of Subsection D is entirely eliminated as utterly meaningless, the remainder of Subsection D adequately covers the step of endorsement to which the entire subsection relates.

The elimination of Subdivision (a) does not nullify, therefore, any material or essential provision of the Ship Mortgage Act. On the contrary, it does away with a provision that is inconsistent with Subsections F and M protecting the mortgagee during the period between recording and endorsement. It is a step, therefore, in the direction of carrying out Congress' intention of protecting the mortgagee to remove an ambiguous and meaningless clause that might cause endless trouble to preferred mortgagees and reduce the security intended to be given them.

It is evident from other portions of the Act that Congress intended anyway to protect the mortgagee while the mortgage is being made a preferred mortgage, even during period between the recording and the making of the endorsement.

Subsection F provides that the mortgagor shall not, without the consent of the mortgagee, incur any con-

tractual obligation creating a lien with specified exceptions "before the mortgagee has had a reasonable time in which to record the mortgage and have endorsements in respect thereto made upon the documents of the vessel." 41 Stat. 1002. Subsection M which defines a "preferred maritime lien" says that that term means a lien arising "prior in time to the recording and indorsement of a preferred mortgage in accordance with the provisions of this section." 41 Stat. 1004.

These subsections show indisputably that Congress did not intend to have any hiatus between the recording and endorsing during which the mortgagee would be unprotected against the incurring of maritime liens on the vessel, for, if it did it would have used not a conjunction like "and" between the words relating to recording and indorsement in the foregoing sections but would have used some disjunctive word like "or".

With Subdivision (a) of Subsection D eliminated as it must be because it is a nullity, the entire foundation of the petitioner's claim that the *Northern Star* mortgage is not a preferred mortgage as of September 23, 1920 is removed and its argument falls to the ground. As previously shown, that elimination does not in any way destroy or materially affect the meaning of the Act because the remainder of the Act carries out the intent of Congress. Moreover, that intent being to protect the mortgagee, the elimination of Subdivision (a) of Subsection D, which is more likely to hamper than protect the mortgagee, is justified.

That elimination removes the only possible bar to preferred status of the *Northern Star* mortgage as of September 23, 1920, for, Subdivision (a) of Subsection D contains

the only language in the entire Act relating to the time when preferred status is acquired.

It is admitted that the mortgage was recorded on August 11, 1920, *Record,* p. 9, and it has been proven that a certified copy of the mortgage was placed with the ship's papers on board the steamer immediately upon her return to an American port from the high seas. *Record,* pp. 61, 95. It was the duty of the Collector of Customs to make endorsement on the ship's papers at the same time, *Record,* 65, but his failure to do so was unimportant because the placing of a certified copy with the ship's papers was more complete notice of the existence and the terms of the mortgage to anyone dealing with the vessel than a mere endorsement on the ship's papers could be.

The District Court very aptly said, *Record,* p. 65:

> "The endorsement on the ship's papers could not be made by the mortgagee, and therefore if the failure of the Collector to make such endorsement be held to deprive the mortgage of its status as a preferred mortgage the whole purpose of Congress would fail."

Such a holding would particularly defeat the purpose of Congress in the case of American steamers plying between foreign ports only. It is common knowledge that there are no American collectors of customs at foreign ports and yet the Act says the endorsement must be made by the Collector of Customs. Consequently, if endorsement were made a *sine qua* preferred status there could not be any preferred mortgage on an American vessel plying between foreign ports, although the mortgage be recorded at the vessel's American home port and a certified copy of the mortgage be placed with the ship's papers.

With such negation as a probable result, it follows that the endorsement should not be overemphasized by making it mandatory when a certified copy has been placed with the vessel's documents.

Therefore all the material requirements for preferred status were satisfied by September 23, 1920 and the *Northern Star* mortgage should be held to have acquired preferred status as of that date.

Moreover, this result is eminently just and fair for an innocent mortgagee should not be penalized by reason of the failure of the Collector of Customs to make endorsement until some months after the recordation. The mortgagee was in no way responsible for that delay.

The Petitioner is not damaged by such a result because a bare endorsement on the ship's papers could not be any better notice to him of the existence of the mortgage and its terms than a certified copy of the mortgage itself. Such a copy was on board the steamer and the petitioner was required by statute, sub-section R, to make inquiry. If it had discharged this duty of inquiry, it certainly would have ascertained from the certified copy with the ship's papers far greater details of the terms of the mortgage than it could from a mere endorsement of the ship's papers. Likewise, the absence of endorsement did not prejudice it, so far as the Custom House records were concerned, because the mortgage had been on record there since August 11, 1920, more than two months before the repairs were made.

Since the Morse Dry Dock & Repair Company has no maritime lien anyway, it cannot be prejudiced no matter what holding this Court makes as to the status of the mortgage.

Both the District Court and the Circuit Court of Appeals sustained the respondent's contention and held that the mortgage was already a preferred mortgage at the time the petitioner's claim arose.

In passing upon this question, the District Court said, *Record*, p. 64:

> "Libellant claims that the said mortgage held by Harry Luber was not a preferred mortgage at the time that Libellant made the repairs to said steamship because it was not endorsed on the ship's papers."

It added, *Record*, pp. 65, 66:

> "The duty of endorsing the fact of the existence of the mortgage on the ship's papers is placed upon the Collector and not upon the mortgagor or mortgagee and must be done by the Collector of the home port of the vessel but if at that time she is in any other port of the United States, the endorsement may be made by the Collector of that port upon direction of the Collector of the vessel's home port, but that provision has no application in the instant case because the vessel at the time of the recording of the mortgage was on the high seas and no endorsement could have been made until her return to the United States.
>
> The first port at which the said vessel was cleared after the recording of the mortgage was the port of New York, its home port, and it was the duty of the Collector to have made such endorsement when said vessel cleared on September 22, 1920.
>
> The endorsement on the ship's papers could not be made by the mortgagee, and therefore if the failure of the Collector to make such endorsement be held to deprive the mortgage of its status as a pre-

ferred mortgage the whole purpose of Congress would fail.

That Congress realized that this situation might arise appears as the reading of the Act continues, and in construing any part of Section 30 it is necessary to construe it as a whole and therefore it did not intend to penalize the mortgagee for any failure of the collector to perform his duty, but place- the penalty on him (see subsection J) (c):

> 'If any person enters into any contract secured by, or upon the credit of, a vessel of the United States covered by a preferred mortgage, and suffers pecuniary loss * * *'

What did the libellant lose by the failure of the Collector to make the endorsement?

The mortgage was recorded in the same city where the libellant had its place of business, a certified copy was on the ship, and surely more information could be gained from an examination of the copy than from any endorsement on the ship's papers.

Bark Moshulu, 1923 A. M. C. 1091.

If the libellant suffered any loss he could recover the same from the Collector of the Port (Subsection J) (c) *supra.*

I therefore am of the opinion that the provision for endorsing the fact of the mortgage on the ship's papers is directory, not mandatory, and the mortgage in question had a preferred status from the date it was recorded, August 11, 1920.

The Nanking, 1923 A. M. C. 1191."

The petitioner appealed from this decision to the Circuit Court of Appeals, which affirmed the part just quoted from the decision of the District Court, although it differed with

the lower Court on the question whether the petitioner had a maritime lien in the first instance. In affirming the District Court's holding that the mortgage had acquired preferred status when the petitioner's claim accrued, the Circuit Court of Appeals said, *Record*, pp. 96, 97:

> "* * * The appellant attacks the validity of the mortgage as a preferred mortgage, contending that the failure to endorse it on the ship's papers before June 27th, 1921, made it invalid prior thereto as such preferred status. It had been recorded in the Custom House on August 11, 1920, and a certified copy placed on the vessel on September 28, 1920. The failure to endorse the mortgage on the ship's papers was the failure of the Collector of Customs. The Act provides for the endorsement of the mortgage on the ship's papers and Sub. Div. M provides that a lien arising prior in time to the recording and endorsement of a preferred mortgage, is a preferred maritime lien, but *these provisions must be interpreted in the light of the whole statute.* Sub. Div. D provides that such endorsement shall be made by the Collector of Customs at the port of documentation of the mortgaged vessel or upon request of the mortgagee by the Collector of Customs at the port where the vessel may be found. It will be noted that the duty is imposed upon the Collector of Customs. *When a vessel is not at her home port, the Collector of Customs at that port cannot make the endorsements on the papers and the endorsement apparently must be made in an American port. Therefore, such recordation may not be made on an American vessel which happens to be plying between foreign ports. But it evidently was the intention of the Ship Mortgage Act to protect the mortgagee even under such circumstances.* That the Act places very strongly

upon the Collector of Customs, the duty of making the endorsement, is indicated by Sub. Div. D which provides, 'and no clearance shall be issued to the vessel until such endorsement is made.' Sub. Div. J renders the Collector of Customs liable to persons entering into any contract on the credit of the vessel who have suffered any damage as a result of the Collector's failure to perform any duty required of him under the Act. *These sections indicate that it was not intended by Congress to penalize a mortgagee for the failure of the Collector of Customs to perform his duty, but placed the responsibility on the Collector.* Furthermore, liability of the mortgagor for any damage to third parties resulting from any failure upon the mortgagor's part, is provided for, and no mention is made of liability on the part of the mortgagee. It was pointed out in *The Egeria* (294 Fed. 791), that such endorsement of the mortgage was a matter with which the mortgagee had nothing to do; that it was the duty of the Collector of Customs to make the endorsement and the presumption would be, until the contrary was shown, that the Collector duly performed his duty and if there was a failure of allegation in this respect, the remedy was to except to the libel, for the defect was one which might have been cured by amendment. *The mortgagee, in the nature of things, has no control over the mortgagor or the Collector of Customs, and the Act indicates that it is not contemplated that the mortgage be invalid by reason of the failure of endorsement by the Collector. It is the intention of the Ship Mortgage Act to protect the mortgagee, not to penalize him for the failure of a government official to comply with the provisions of the Act.* All was done here that could be done by the recordation of the mortgage, the placing of it among the papers of the ship, and the delay of the Collector of Customs

in making the endorsement, to some extent excused by reason of the fact that the vessel was on the high seas, will not invalidate this mortgage as a preferred mortgage. (*The Nanking*, 1923 A. M. C. 1191, Dist. Ct. No. Dis. of Calif.; *The Oconee*, 280 Fed. 927; *The Owego*, 292 Fed. 403). *The purpose of such an endorsement manifestly is to give notice to persons having dealings with the vessels that there is a preferred mortgage upon it. Such notice was amply given by the record of August 11, 1920, in the Custom House and filing a certified copy on board the vessel with its papers on September 23, 1920.* Reasonable care and diligence by way of investigation, would have given the appellant knowledge of the mortgage and its terms before the repairs were made in November, 1920. (*United States* v. *Carver*, 260 U. S. 482; *The Princess Matoika*, 1924 A. M. C. 1033; *The Mossabee*, 1923 A. M. C. 874, C. C. A. 4th Circuit; *The Susanna*, 2 (2") Fed. 410.)"

Although the petitioner seeks to convey the impression that there is a divergence of opinion on the point, the fact is that the decisions of the various courts uniformly support the conclusions reached by the District Court and the Circuit Court of Appeals in the case at bar.

In the first place, a similar holding was made by the District Court for the Northern District of California on August 20, 1923, in *The Nanking*, 292 Fed. 641. 1923 American Maritime Cases. In that case, Judge Partridge, speaking of the effect of the endorsement, said at pages 1202 and 1203:

> "Next, that this provision of the mortgage was not and is not endorsed upon the vessels' documents as required by subdivision (1), (c) (4) and (e) of subsection 'D' of said Section 30, in that while said

purported mortgage or deed of trust included property other than the vessel, to wit, forty-eight hundred and fifty shares of the capital stock of China Pacific Steamship Company, Limited, and so forth, no endorsement was made upon the vessel's documents of a specified portion of the mortgage indebtedness.

I would be loath, indeed, to decide that people who had, in good faith, invested three-quarters of a million dollars upon both these vessels and other vessels mortgaged should be denied their right to get such of their money as they can out of the proceeds, by any strained construction of the Act. *I would be particularly loath to do that for the reason that at the time this mortgage or deed of trust was prepared the Ship Mortgage Act was a new thing.* As I remember it, this mortgage was prepared within a few weeks or at most, within a month or two after the Ship Mortgage Act became a law.

But aside from that I am convinced that the provision of the Ship Mortgage Act for the endorsement upon the papers of the vessel is merely directory and faiure to do so does not make the mortgage void • • •.

The exceptions, therefore, or so much of the exceptions to the answers as go to the constitutionality of the Act and the allegation that the mortgage in this particular case is void as it does not conform to the Act, will be sustained without leave to amend."

It will be noted that in the *Nanking* "the mortgage was not and is not endorsed upon the vessels' documents," whereas in the case of the *Northern Star* the endorsement was made upon the ship's papers eventually on June 27, 1921. Consequently the Court's holding in the *Nanking*

goes even farther than the decisions of the District Court and the Circuit Court of Appeals in the case at bar.

The foregoing interpretation is supported by a more recent decision of the Circuit Court of Appeals for the Ninth Circuit, *The Egeria* (C. C. A., 9th Circ., Dec. 17, 1923, rehearing denied Feb. 11, 1924), 294 Fed. 791. In that case, Judge Gilbert, writing the opinion for the Court, said at pages 792 and 793:

> "The copy of the mortgage filed as an exhibit to the libel contained the requisite affidavit, and while it is true that *the libel failed to allege that the mortgage was indorsed upon the ship's documents,* the absence of such an allegation is believed to be immaterial. *Such indorsement of the mortgage was a matter with which the mortgagee had nothing to do. It was the duty of the collector of customs to make the indorsement,* and the presumption would be, until the contrary were shown, that the collector duly performed his duty. And if indeed there was failure of allegation in that respect the remedy of the appellants was to except to the libel, the defect being one which might have been cured by amendment. *In line with our view of the statute are the decisions in the Oconee* (D. C.), 280 Fed. 927, and *The Owego* (D. C.), 292 Fed. 403, *holding that the statute is remedial and should be liberally construed.* In *The Oconee* case the Court said:
>
> > *'The statute itself nowhere seems to contemplate any default on the part of the mortgagee for the failure of compliance with those sections of the act to be performed by the mortgagor and the master.* The mortgagor * * * is subjected to a penalty if he fails to deliver on board the ship a copy of the mortgage. The master is likewise subject to a penalty if he fails to exhibit the same

> when called upon. *The mortgagee, in the nature of things, has no control over either, and the act clearly does not contemplate the invalidity of the mortgage by reason of such failure on their part.'"*

The effect of having a certified copy of the mortgage on board the steamer is well stated by Judge Dooling in the recent case of the *Bark Moshulu* (N. D. Cal., Oct. 10, 1923), 298 Fed. 348, as follows:

> "• • • The endorsement of the preferred mortgage claim may work an apparent hardship to the other lien claimant, but *it is to be noted that a certified copy of the mortgage was on board the vessel subject to examination* by any person having business with the vessel which might give rise to a maritime lien and that the master was bound to exhibit to any such person the documents of the vessel and such copy (subsection E, Act June 5th, 1920). *So that claimants had ample opportunity to know that any claim on their part for services rendered the vessel would be subordinate to the lien of the mortgage."*

In its endeavor to give the impression that there is a divergence of Court opinions, the petitioner cites the decision in the *Northern Wave,* 4 F. (2d) 308, and *The Bethlehem,* 4 F. (2d) 308. As a matter of fact, these cases did not in any way pass upon the preferred status of a mortgage, but the principal questions involved in them were the libellant's right to any maritime lien and the right to attack a decree *pro confesso* collaterally. The questions raised were stated by the Circuit Court of Appeals as follows:

> "The main questions arising from the whole transaction are, first whether libellants for supplies and repairs used such diligence to find the agreements of purchase and the mortgages, which contained covenants denying the owner the right to incur liens upon the ships, as would entitle them to maritime liens under the Act of 1920; and, secondly, if they did, whether the decrees *pro confesso* are subject to collateral attack and to be set aside by orders of reference to a commissioner more than four months after the date of the decrees and by renewed orders of reference made about two years thereafter, there being no question of fraud or of the lack of the court's jurisdiction."

It will be noted, therefore, that the preferred status of the mortgage was not a question before the Court.

Moreover, the Court's statement of facts shows that those cases differed materially from the case at bar in that copies of the mortgages were not carried with the ships' papers.

> "On November 20, 1920, agreements of sale of the ships were executed as of October 22, 1920, the date the ships were delivered. The purchaser also executed mortgages against the ships covering the deferred payments which were recorded at Baltimore, Maryland, the home port, on November 20, but endorsement of the mortgages on the ship's documents was not made until January 14, 1921, *nor were copies of the mortgages carried on the ships,* as required by the Ship Mortgage Act of 1920 to give them the status of preferred mortgages."

The petitioner's discussion of *The Oconee,* 280 Fed. 927, is also irrelevant. *Petitioner's Brief,* page 24. The fact that the Court in that case did "not expressly or impliedly

undertake to excuse the failure to have the mortgage endorsed'' is explained by the petitioner's own statement on page 23 of its brief that ''the preferred status of the mortgage was attacked in *The Oconee* case for the failure to comply with the provisions of Subsection E • • •'' which subsection requires the placing of a certified copy of the mortgage with the ship's papers. There was no occasion, therefore, for Judge Groner to pass on the effect of endorsement in *The Oconee* and anything he might have said would have been only *obiter dictum.*

Moreover, it has been unquestionably proven that a certified copy of the mortgage was placed with the ship's papers in the case of *The Northern Star.*

Consequently there is no divergence of Court opinions as the petitioner seeks to imply. This is confirmed by the statement in its brief at page 18 ''that we are unable to cite in support of our contention any cases exactly in point • • •.''

So far from there being any divergence of opinion, all the Courts that have passed upon the question have uniformly held that the requirements for endorsement are directory, not mandatory, and that the failure to comply with the provisions of Subdivision (a) of Subsection D does not deprive the mortgage of preferred status.

The fact that there is such a uniformity of opinion in favor of the respondent's contentions is all the more reason for treating Subdivision (a) of Subsection D as a nullity, which in fact it is anyway, particularly since it is inconsistent with Subsections F and M.

The petitioner itself impliedly admits that the requirements of Subdivision (a) are directory at the best, even if

that subdivision is given any effect, when it says of Subsection E relating to the placing of a certified copy of the mortgage with the ship's papers: "This provision is directory merely and has to do with the handling of the mortgage after it has been recorded." Obviously if the placing of a certified copy on board the ship, which copy gives full details of the provisions of the mortgage copy, is only directory then the making of a bare endorsement, which gives no details of the mortgage's provisions is also directory.

It is respectfully submitted, therefore, that the *Northern Star* mortgage had preferred status as of September 23, 1920, the date that a certified copy was placed on board the ship, since from that date on anybody exercising the slightest diligence could learn the full terms of the mortgage more satisfactorily than from a mere endorsement on the ship's papers, which are always carried with the vessel anyway.

II. There is no possible doubt that the mortgage acquired preferred status, at least, as of June 27, 1921, the date of its endorsement.

By June 27, 1921, all the steps described in the Ship Mortgage Act were completed. The mortgage had been recorded on August 11, 1920. *Record,* p. 9. A certified copy had been placed with the ship's papers on September 23, 1920, and had remained there continuously up to the date of the marshal's sale. *Record,* pp. 62, 95. The endorsement was made on the ship's papers on June 27, 1921. *Record,* p. 9.

Consequently, there was nothing left that the most meticulous objector could require to give the mortgage pre-

ferred status. It follows that it had such status beyond any doubt as of June 27, 1921.

III. Even if it is assumed that the Morse Dry Dock & Repair Company has a maritime lien and that the mortgage did not acquire preferred status until June 27, 1921, the repairman's lien is not a preferred maritime lien within the meaning of the Ship Mortgage Act and therefore does not take priority over the preferred mortgage lien.

In order to demonstrate that, in no event, can the claim of the Morse Dry Dock & Repair Company be superior to the claim of the holder of the mortgage, let us assume, for purposes of argument only, that the petitioner has a maritime lien. As has been previously shown, the mortgage had preferred status at least as of June 27, 1921. Consequently it constitutes also a maritime lien.

The situation then under the foregoing assumption would be that there are two maritime liens and the question arises as to which is the junior lien.

The Ship Mortgage Act provides in Subsection M, Subdivision (b) that upon the sale of any mortgaged vessel by order of a District Court "the preferred mortgage lien shall have priority over all claims against the vessel, except (1) preferred maritime liens, and (2) expenses and fees allowed and costs taxed, by the Court." 41 Stat. 1004.

Therefore, if the assumed lien of the Morse Dry Dock & Repair Company is to have priority over the preferred mortgage lien, it must be shown to be a "preferred maritime lien."

(a) *A preferred maritime lien is one that arose prior in time to both the recording and the endorsement of the preferred* ***mortgage.***

A "preferred maritime lien" is defined in Subsection M (a) as "(1) a lien arising prior in time to the recording *and* indorsement of a preferred mortgage in accordance with the provisions of this section; or (2) a lien for damages arising out of tort, for wages of a stevedore when employed directly by the owner, operator, master, ship's husband, or agent of the vessel, for wages of the crew of the vessel, for general average, and for salvage, including contract salvage."

A mere examination of the foregoing provisions makes it obvious that the petitioner's claim does not fall within the definition given under the numeral (2). Therefore if the petitioner is to have a preferred maritime lien, it must be on the basis of its claim having accrued prior "to the recording and indorsement."

There is only one possible interpretation of this provision and that is that the claim to be a preferred maritime lien must have arisen before both the recording and endorsement. If it arose before the endorsement but after the recording, that is not sufficient. The language is too clear to permit of any doubt on that ground and the cases cited by the petitioner in its brief on pages 37 and 38 establish the obvious fact that "and" means "and" and not "or". They are sufficient authority against changing the word "and" to "or" by judicial interpretation.

If this Court should hold that a claim that arose after recording but before indorsement is a preferred maritime

lien, it would in effect be transgressing upon the legislative functions of Congress and by its decision would be changing the Ship Mortgage Act by substituting "or" for "and" between the words "recording" and "indorsement". It is confidently asserted that no Court should do this.

(*b*) *The Morse Dry Dock & Repair Company does not have such a preferred maritime lien.*

As a matter of fact, the mortgage was recorded on August 11, 1920. The repairs which are the basis of the claim of the Morse Dry Dock & Repair Company were furnished between November 14, 1920 and November 27, 1920. *Record*, p. 9. The endorsement was made June 27, 1921.

Consequently the repairs were made after the recordation and before the endorsement. Since the Act says that a preferred maritime lien is one that arose prior in time "to the recording *and* endorsement", the petitioner cannot have any preferred maritime lien.

Since the Act further provides that after marshal's sale "the preferred mortgage lien shall have priority over all claims against the vessel, except (1) preferred maritime liens, and (2) expenses and fees allowed and costs taxed by the Court", 41 Stat. 1004, it follows the respondent's preferred mortgage lien has priority, even if the petitioner is assumed to have a maritime lien.

LAST POINT.

THE DECREE OF THE CIRCUIT COURT OF APPEALS SHOULD BE MODIFIED SO AS TO DENY THE MORSE DRY DOCK & REPAIR COMPANY A MARITIME LIEN AND AS MODIFIED THE DECREE SHOULD BE AFFIRMED.

It is too well established to require the citation of authorities that the review by this Court of a case in admiralty constitutes a trial *de novo*.

Since it has been established that the Morse Dry Dock & Repair Company cannot have a maritime lien, because there was no pledge of the vessel's credit and none can be presumed on account of the restrictions against liens contained in the agreement for sale and the preferred mortgage, the Circuit Court of Appeals should be instructed to modify its decree so as to provide that the petitioner has no maritime lien whatever.

Since it has also been established that the mortgage has preferred status as of September 23, 1920 and since there can be no doubt that it had such status as of June 27, 1921, the remainder of the decree of the Circuit Court of Appeals giving the respondent a preferred mortgage lien and priority of that lien over the claim of the petitioner should be affirmed.

Respectfully submitted,

GERSON C. YOUNG,
FRANK A. BERNERO,
Of Counsel.

New York City, May, 1926.

SUPREME COURT OF THE UNITED STATES.

No. 326.—October Term, 1925.

Morse Dry Dock & Repair Company, Petitioner, *vs.* Steamship Northern Star, her Engines, etc., and Harry Luber.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[June 7, 1926.]

Mr. Justice Holmes delivered the opinion of the Court.

The petitioner libelled the Northern Star alleging a lien for repairs furnished in New York, the home port of the vessel. The intervenor, Luber, set up a mortgage from the owner, the American Star Line, Inc., for over a million dollars, and the question here is which is entitled to priority. Both the District Court and the Circuit Court of Appeals decided in favor of the mortgage. 295 Fed. Rep. 366. 7 F. (2d) 505. A writ of certiorari was granted by this Court. 268 U. S. 683.

The mortgage, originally given to the United States when the ship was purchased, was executed and recorded on August 11, 1920, and a certified copy was left and kept with the ship's papers from September 23, 1920, but it was not endorsed upon the ship's papers until June 27, 1921. The repairs were made between November 14 and November 7, 1920, at the owner's request. One of the covenants of the mortgage was not to suffer or permit to be continued any lien that might have priority over the mortgage, and in any event within fifteen days after the same became due to satisfy it. Another covenant, probably shaped before the then recent Ship Mortgage Act, 1920, June 5, 1920, c. 250, § 30, 41 Stat. 988, 1000, required the mortgagor to carry a certified copy of the mortgage with the ship's papers, and to take other appropriate steps to give notice that the owner had no right to permit to be imposed on the vessel any lien superior to the mortgage. On

these facts we feel no doubt that the petitioner got a lien upon the ship, as was assumed by the Circuit Court of Appeals. Ship Mortgage Act, Subsection P, 41 Stat. 1005.

The owner of course had 'authority to bind the vessel' by virtue of his title without the aid of statute. The only importance of the statute was to get rid of the necessity for a special contract or for evidence that credit was given to the vessel. Subsection R, it is true, after providing that certain officers shall be included among those presumed to have authority from the owner to create a lien for supplies goes on that "nothing in this section shall be construed to confer a lien when the furnisher knew, or by exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, agreement for sale of the vessel, or for any other reason, the person ordering the repairs, supplies, or other necessaries was without authority to bind the vessel therefor." But even if this language be construed as dealing with anything more than the authority of a third person to represent the owner so as to create a lien, still when supplies are ordered by the owner the statute does not attempt to forbid a lien simply because the owner has contracted with a mortgagee not to give any paramount security on the ship. The most that such a contract can do is to postpone the claim of a party chargeable with notice of it to that of the mortgagee.

The petitioner's lien was valid and on the other hand there is equally little doubt that the mortgage was valid as soon as it was executed and recorded, before the endorsement upon the ship's papers. This view seems to us plainly to be taken in Subsections C and D of the Act. So the question more precisely stated is whether the above-mentioned covenants postponed the lien to the mortgage security, as they would seem to do on the facts of the case but for the language of the statute that we shall quote.

The statute, after requiring the instrument to be recorded in the office of the Collector of Customs of the port of documentation, in order to be valid against persons not having actual notice, (Subsection C,) provides in Subsection D, (a) that "A valid mortgage which . . . . , shall in addition have, in respect to such vessel and as of the date of the compliance with all the provisions of this subdivision, the preferred status given by the provisions of Subsection M, if—(1) the mortgage is indorsed upon the vessel's

documents in accordance with the provision of this section", with other conditions, (b) upon compliance with which the mortgage is called a 'preferred mortgage'. Then follows in (c) a statement of what shall be indorsed. By (d) the indorsement is to be made by the collector of customs of the port of documentation or by the collector of any port in which the vessel is found if so directed by the former, and no clearance is to be issued to the vessel until such indorsement is made. Subsection M gives priority to a preferred mortgage over all claims against the vessel "except (1) preferred maritime liens and (2) expenses and fees allowed and costs taxed, by the court." By (a) of the subsection " 'preferred maritime lien' means (1) a lien arising prior in time to the recording and indorsement of a preferred mortgage in accordance with the provisions of this section." Obviously the statute taken literally may work harshly if by any oversight or otherwise the collector does not do his duty, and excellent reasons could be found for charging the petitioner with notice of a document that both was recorded and was kept with the ship's papers. But the words of the statute seem to us too clear to be escaped. The mortgage is made preferred only upon compliance with all the conditions specified, one of which is indorsement, and the maritime lien is preferred if it arises before the recording and indorsement of the mortgage. We see no room for construction, and there is nothing for the courts to do but to bow their heads and obey.

Decree reversed.

The separate opinion of Mr. Justice McReynolds.

The repairs for which petitioner claims a lien were made at the vessel's home port, and there is nothing whatever to show any effort to bind her for their payment by special agreement. Under such circumstances the general maritime law gives no lien. If the repair company acquired one it arose from the provisions of the Act of 1920, and not otherwise. While Subsection P, Section 30 of that Act declares generally that any person furnishing repairs shall have a lien on the vessel without allegation or proof that

credit was extended to her, Subsection R of the same section expressly provides that "nothing in this *section* shall be construed to confer a lien when the furnisher knew, or by exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, agreement for sale of the vessel, or for any other reason, the person ordering the repairs, supplies, or other necessaries was without authority to bind the vessel therefor."

When the petitioner furnished the repairs at the home port there was on the public record in the Collector's office at that same port a duly-authenticated bill of sale and a purchase money mortgage (a copy of the latter was also on board), which disclosed an express agreement by the owner "not to suffer nor permit to be continued any lien, encumbrance or charge which has or might have priority over this mortgage of the vessel." The petitioner had easy access to these instruments and, by exercising slight diligence, might have ascertained their contents. They deprived the owner of both right and authority, within the true intent of the statute, to create the lien now claimed by the repair company. The purpose of this enactment was to protect honest furnishers who exercise diligence, and not to offer a wide-opened door for crooked transactions.

The trial judge held that under the circumstances the petitioner acquired no lien. I agree with him, and even venture to think that the argument in support of his conclusion cannot be vaporized by mere negation.